

89-162

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

STANLEY EXNER,

PETITIONER

v.

LOUIS W. SULLIVAN,
Successor in Office to
OTIS R. BOWEN, Secretary
of Health and Human Services,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES J. WALL

Legal Services of the Lower Cape Fear,
Inc.

106 Market Street

Post Office Box 814

Wilmington, North Carolina 28402-0814

(919) 763-6207

COUNSEL OF RECORD

59 1/2

QUESTIONS PRESENTED

I. MAY A FEDERAL COURT AFFIRM A DECISION OF THE SECRETARY OF HEALTH AND HUMAN SERVICES DENYING WAIVER OF RECOUPMENT OF AN OVERPAYMENT OF SUPPLEMENTAL SECURITY INCOME BENEFITS BASED UPON AN ADVERSE CREDIBILITY DETERMINATION WHEN THE SECRETARY OF HEALTH AND HUMAN SERVICES HAS NEVER MADE ANY ADVERSE CREDIBILITY DETERMINATION?

II. IN ORDER TO WARRANT DEFAULT JUDGMENT AGAINST THE UNITED STATES AS A SANCTION FOR FAILURE TO OBEY COURT SCHEDULING ORDERS, MUST A PLAINTIFF HAVE AN UNCONTROVERTED CLAIM FOR RELIEF?

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW.....	2
JURISDICTION.....	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	4
STATEMENT OF THE CASE.....	5
A. The Facts.....	5
B. Administrative Proceedings..	9
C. Proceedings in the District Court.....	12
D. Proceedings in the United States Court of Appeals for the Fourth Circuit.....	13
JURISDICTION IN THE COURT OF FIRST INSTANCE.....	14
REASONS FOR GRANTING THE WRIT.....	15
I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF AN ADVERSE CREDI- BILITY FINDING CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.....	15

II.	THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.....	25
III.	THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS SO FAR SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.....	31
IV.	THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF THE LEGAL STANDARD TO DETERMINE DEFAULT JUDGMENT AGAINST THE UNITED STATES AND A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.....	38
	CONCLUSION.....	50

TABLE OF AUTHORITIES

CASES	PAGE
Alameda v. Secretary of HEW, 622 F.2d 1044.....	39, 40, 41, 42
Albemarle Paper Co. v. Moody, 422 U.S. 405.....	43, 44
Arnold v. Secretary of HEW, 567 F.2d 258.....	32
Atchison, Topeka, & Sante Fe Railway Co. v. U.S., 295 U.S. 193.....	18
Baerga v. Richardson, 500 F.2d 309.....	29
Burlington Truck Lines v. U.S., 371 U.S. 156.....	17, 18
Califano v. Yamasaki, 442 U.S. 682.....	19, 20, 21, 23
Collins v. Seaboard Coastline Railroad, 681 F.2d 1333.....	44
Cook v. Heckler, 783 F.2d 1168.....	32
Cotter v. Harris, 642 F.2d 700.....	28
Doe v. Charleston Area Medical Center, 529 F.2d 638.....	33

CASES (CONT'D)

Donato v. Secretary of HHS, 721 F.2d 414.....	28
Dundee Cement Co. v. Howard Pipe and Concrete Products, Inc., 722 F.2d 1319.....	43
Gaimer v. Secretary of HHS, 815 F.2d 1275.....	28
Garfield v. Schweiker, 732 F.2d 605.....	29
Giampaoli v. Califano, 628 F.2d 1190.....	42
Gordon v. Schweiker, 727 F.2d 231.....	32
Hammond v. Heckler, 765 F.2d 424.....	33
Herbert v. Heckler, 783 F.2d 128.....	29
Huston v. Bowen, 838 F.2d 1125.....	29
Johnson v. Heckler, 767 F.2d 180.....	29
MacGregor v. Bowen, 786 F.2d 1050.....	27
Marziliano v. Heckler, 728 F.2d 151.....	42

CASES (CONT'D)

Maxey v. Califano, 598 F.2d 874.....	32
Mitchell v. W.T. Grant Co., 416 U.S. 600.....	20
Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29.....	18, 19
Poe v. Mathews, 572 F.2d 137.....	47
Richardson v. Perales, 402 U.S. 389.....	16
Schweiker v. Chilicky, 487 U.S. ____.....	37, 38
Schwingel v. Harris, 631 F.2d 192.....	25
Shelman v. Heckler, 821 F.2d 316.....	29
Small v. Califano, 565 F.2d 797.....	28
Smith v. Califano, 592 F.2d 1235.....	32
Smith v. Heckler, 782 F.2d 1176.....	32
Thorne v. Weinberger, 530 F.2d 580.....	32

(VII)

CASES (CONT'D)

United States v. Burr, 25 F.Cas. 30.....	44
Varney v. Secretary of HHS, 859 F.2d 1396.....	27
Viehman v. Schweiker, 679 F.2d 223.....	26, 27

REGULATIONS

20 C.F.R. § 404.507.....	20
20 C.F.R. § 404.510.....	4
20 C.F.R. § 416.552.....	4, 22
20 C.F.R. § 416.553.....	4, 22
20 C.F.R. § 416.554.....	4, 22

STATUTES

5 U.S.C. § 1007.....	16
28 U.S.C. § 1254.....	4
42 U.S.C. § 404.....	4, 19
42 U.S.C. § 405... 4, 12, 14, 16, 36	
42 U.S.C. § 1383.....	4, 19

MISCELLANEOUS

Rule 55, Federal Rules of Civil
Procedure..... 4, 43, 45, 46, 47

Wright, Miller & Cooper,
Federal Practice and
Procedure, § 2702..... 43

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The petitioner, Stanley Exner,
respectfully prays that the Supreme
Court grant a writ of certiorari to
review the judgment and opinion of the
United States Court of Appeals for the

Fourth Circuit entered in the above-entitled proceeding on December 15, 1988. A petition for rehearing and suggestion for rehearing en banc was denied by an Order of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on March 29, 1989.

OPINIONS BELOW

The December 15, 1988 opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is reprinted in the Appendix hereto, p. A-4 (hereinafter "App."). The March 29, 1989 Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and rehearing en banc is reprinted, App. A-31.



The Order of the United States District Court for the Eastern District of North Carolina, entered January 7, 1988 and filed January 8, 1988 affirming the decision of the Administrative Law Judge (hereinafter ALJ), is reprinted at App. A-7. The Order of the United States District Court for the Eastern District of North Carolina entered December 3, 1987 and filed December 7, 1987 denying default judgment, is reprinted at App. A-14.

The final decision of the Secretary of Health and Human Services entered November 22, 1985, denying waiver of recoupment of overpayment, is reprinted at App. A-19.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the

Fourth Circuit was issued on December 15, 1988. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED**

This case involves the following provisions of the Social Security Act: 42 U.S.C. § 404(b), 42 U.S.C. § 405(b)(1), 42 U.S.C. § 405(g), and 42 U.S.C. § 1383(b)(1). This case also involves the following regulations of the Secretary of Health and Human Services: 20 C.F.R. § 416.552, 20 C.F.R. § 416.553, 20 C.F.R. § 416.554, 20 C.F.R. § 404.510a. In addition, this case involves Rule 55 of the Federal Rules of Civil Procedure.

The provisions of the above statutes, federal regulations, and federal rules of civil procedure, are set out in the Appendix hereto, App. A-249-262.

STATEMENT OF THE CASE

A. The Facts

On June 7, 1979, Stanley A. Exner applied for Supplemental Security Income (hereinafter SSI) disability benefits on behalf of his eight-year-old child, Anthony Exner, who is severely handicapped as a result of cerebral palsy and epilepsy, and requires extensive and expensive medical care and treatment. When Mr. Exner went to the Social Security office to apply for disability benefits for his son, a representative of the Social Security

Administration (hereinafter SSA) filled out an application and Statement of Income and Resources which Mr. Exner signed. App. A-105-128.

At the time he applied for SSI, Mr. Exner was not employed. Mr. Exner told the Social Security representative that he had been hired for a civil service job at Camp LeJeune, App. A-49-79, and that he would begin work in approximately one month with a starting salary of \$13,100 per year. App. A-77. The Social Security representative, who conducted the interview and filled out the application for Mr. Exner, did not record this information on the application.

When Mr. Exner told the Social Security representative that he had obtained employment, the amount of his

salary, and when he would be starting work, the Social Security representative indicated to Mr. Exner that that was okay. App. A-77. The Social Security representative further told Mr. Exner that he would receive a package around October of the following year and would have to fill it out to determine if his son was still eligible for SSI at that time. The Social Security representative seemed to accept Mr. Exner's statement about his employment at Camp LeJeune merely by saying that such employment was "okay". App. A-77-79. From this, Mr. Exner understood the Social Security representative to discount the issue of Mr. Exner's employment and indicate that employment was alright so far as SSI benefits for his son was concerned. These statements

by the Social Security representative, taken together, indicated to Mr. Exner that he need not report anything further to SSA until October 1980.

On August 8, 1979, approximately two months after Mr. Exner applied for SSI and informed the Social Security representative of his upcoming job and amount of his salary, SSA sent Mr. Exner a supplemental security income payment decision, which, along with other information near the bottom of the page, required notification of changes in income for Anthony Exner or members of his household. Mr. Exner did not immediately notify Social Security, after receiving this notice, that he in fact had begun work.

During the period of time when Mr. Exner received the August 8, 1979 payment decision, he was going through the breakup of his marriage as well as severe emotional problems occasioned by his son's condition. Mr. Exner did not recall seeing the payment decision at the time but later found the document among his important papers. App: A-62-67.

During this period of time, Mr. Exner's living expenses for himself and his family were greater than his total income, and he could not afford to repay the SSI overpayment. App. A-169.

B. Administrative Proceedings

Mr. Exner applied for a waiver of recoupment of overpayment benefits. After denial, Mr. Exner requested and obtained a hearing before an Administra-

tive Law Judge (hereinafter ALJ). At hearing, Mr. Exner testified to the facts as hereinbefore summarized.

A hearing was held on November 7, 1985 and the ALJ rendered the decision on November 22, 1985. App. A-19. In his decision, the ALJ determined that Mr. Exner was not without fault because he failed to furnish relevant information about his employment to the Social Security Administration (hereinafter SSA) after he received the notice of August 8, 1979. The decision of the ALJ does not assess Mr. Exner's credibility, and in fact does not even mention credibility or indicate in any way that the ALJ did not find Mr. Exner to be a credible witness. App. A-21-30. The ALJ also failed to consider whether Mr. Exner's notification of the Social

Security representative on June 7, 1979, that Mr. Exner had obtained employment in the amount of compensation expected, met the requirement of the Social Security regulations which require Mr. Exner to furnish relevant information. The ALJ also did not consider Mr. Exner's reliance upon information received from an official source in SSA, the Social Security representative who took his application, nor did he evaluate Mr. Exner's relevant mental and emotional state in determining whether or not Mr. Exner was without fault. App. A-21-30. The ALJ, in his decision, relied exclusively on the notice of August 8, 1979, in Mr. Exner's failure to immediately notify the agency thereafter that he had become employed. App. A-28.

The Appeals Council affirmed the ALJ's decision, thus making it the final decision of the Secretary.

C. Proceedings in the District Court

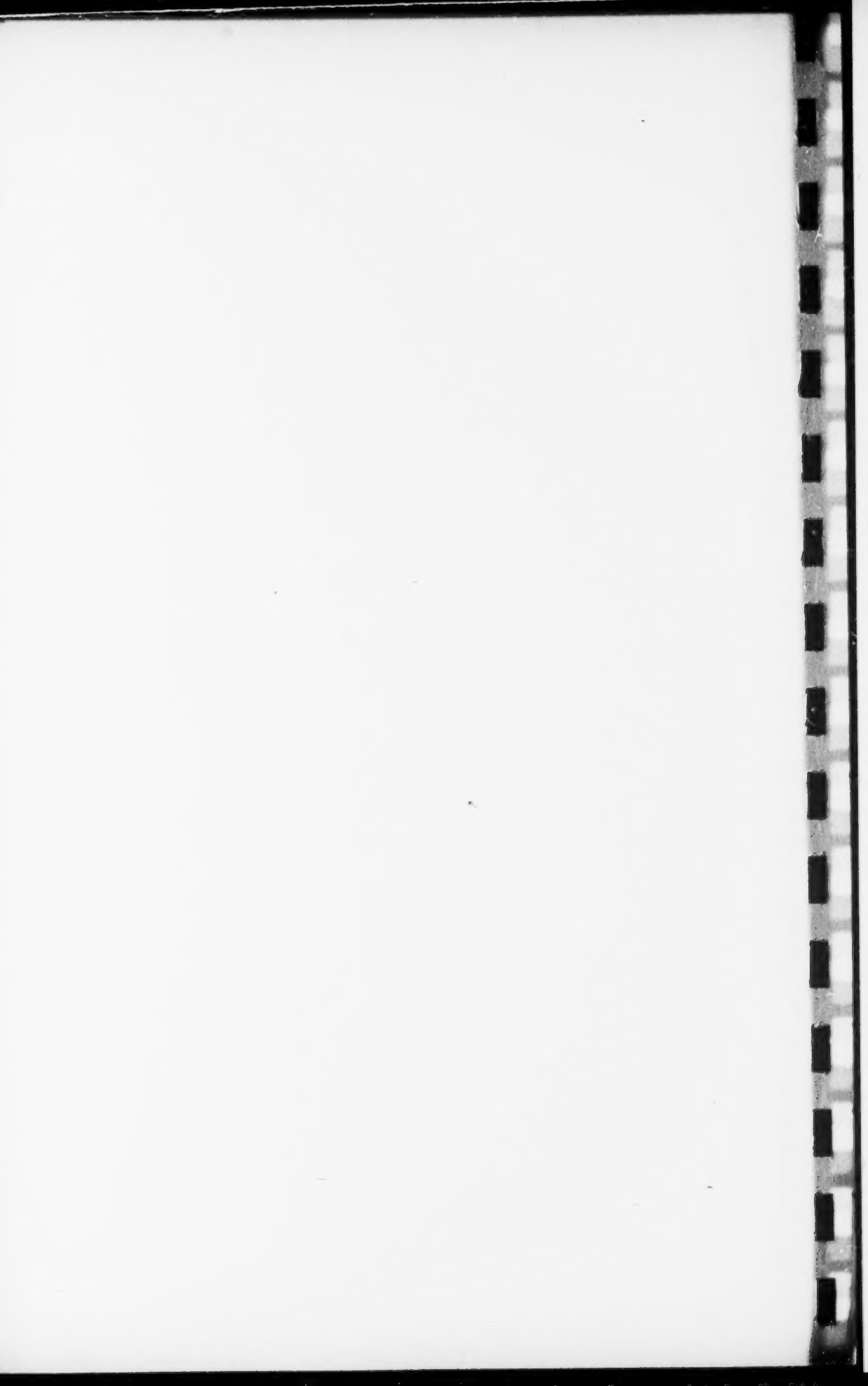
Mr. Exner commenced the present action to obtain judicial review of a final decision of the Secretary, invoking jurisdiction of the United States District Court for the Eastern District of North Carolina pursuant to 42 U.S.C. § 405(g). Mr. Exner called to the Court's attention, in his motion for summary judgment, the failure of the Secretary to make findings regarding Mr. Exner's credibility. In addition, Mr. Exner, through counsel, asserted that he had properly notified SSA of his employment by the information he provided on June 7, 1979 when he applied for benefits; that he relied upon erroneous

information from an official source within SSA; and that the Secretary failed to properly assess his mental capacity. App. A-206-220.

After filing his motion for summary judgment, the Secretary failed to comply with court scheduling orders for a response, and Mr. Exner's counsel moved the entry of default and default judgment as a sanction. App. A-179. This motion was denied by the district court, App. A-14-18, and the district court affirmed the decision of the Secretary holding that an adverse credibility determination had been made by the Secretary. App. A-7-13.

D. Proceedings in the United States Court of Appeals for the Fourth Circuit

Mr. Exner appealed the decision of the district court and pointed out to



the United States Court of Appeals for the Fourth Circuit, all of the above issues and specifically pointed out that the district court's decision was in error because the Secretary of Health and Human Services had never made any credibility determination with respect to Mr. Exner's credibility. App. A-221-248. Nonetheless, the United States Court of Appeals for the Fourth Circuit affirmed summarily, adopting the reasoning of the district court, App. A-4-6, and denied a petition for rehearing and rehearing en banc. App. A-31.

**Jurisdiction in the
Court of First Instance**

The United States District Court for the Eastern District of North Carolina had federal jurisdiction over the present case as the court of first instance pursuant to 42 U.S.C. § 405(g).

REASONS FOR GRANTING THE WRIT

- I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF AN ADVERSE CREDIBILITY FINDING CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals in the present case adopted the reasoning of the United States District Court upon the issue of credibility findings. App. A-4-6. The district court, in its order of January 8, 1988, indicates that the ALJ determined the issue of credibility against Mr. Exner. App. A-12. In fact, no such determination was made in the ALJ's decision. App. A-21-30. In fact, the ALJ nowhere in his decision ever discusses credibility nor even points to any evidence in the record which brings Mr. Exner's credibility into question. A fair reading of the ALJ's decision would appear to indicate that, if

anything, he at least by implication accepted Mr. Exner's testimony as true. App. A-21-30. The district court was correct when it stated, App. A-12, that credibility decisions are functions of the Secretary, not the courts; citing Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971).

Decisions of this Court interpreting relevant provisions of the Administrative Procedure Act, 5 U.S.C. § 1007(b), are relevant and should be considered in the present case in interpreting the requirements of the Social Security Act, 42 U.S.C. § 405(b), that the Secretary of Health and Human Services make the findings. As this Court pointed out in Richardson v. Perales, 402 U.S. at 409, 28 L.Ed.2d at 857, Social Security administrative

procedure does not vary from that described in the Administrative Procedures Act; for the Administrative Procedures Act is modeled upon the Social Security Act.

In Burlington Truck Lines v. U.S., 371 U.S. 156, 82 S.Ct. 239, 9 L.Ed.2d 207 (1962), there were no findings, and no analyses to justify the administrative choices made. Mr. Justice White, writing for the court in Burlington Truck Lines v. U.S., 371 U.S. at 167, 9 L.Ed.2d at 215, states:

We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. (citation omitted). Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its

discretion." (citation omitted)
(emphasis in original)

Burlington Truck Lines v. U.S., 371 U.S. at 168, 9 L.Ed.2d at 216, goes on to require that the agency must make findings that support its decision, and those findings must be supported by substantial evidence.

In the absence of a finding as to essential facts, the order of an administrative agency cannot be sustained. Atchison, Topeka, & Santa Fe Railway Co. v. U.S., 295 U.S. 193, 55 S.Ct. 748, 79 L.Ed. 1382 (1935). An agency must examine relevant data and articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choices made even where the scope of review is the arbitrary and capricious standard. Motor Vehicle Manufacturers

Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

42 U.S.C. § 1383(b)(1) provides for a waiver of overpayment to an individual who was without fault in connection with the overpayment if adjustment or recovery of the overpayment would defeat the purposes of the Social Security Act, or be against equity and good conscience, or impede the efficient and effective administration of the Social Security Act.

This provision is essentially identical to the provisions of 42 U.S.C. § 404(b) regarding waiver of overpayment of social security, as opposed to SSI, benefits. In Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979), the Court pointed out that

written review hardly seems sufficient to discharge the Secretary's statutory duty to make an accurate determination of waiver under § 204(b) of the Social Security Act, 42 U.S.C. § 404(b). The court in Califano v. Yamasaki went on to say:

Under that subsection, the Secretary must assess the absence of "fault" and determine whether or not recoupment would be "against equity and good conscience"....The Court previously has noted that a "broad 'fault' standard is inherently subject to factual determination and adversarial input." Mitchell v. W.T. Grant Co., 416 U.S. 600, 617, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974). As the Secretary's regulations make clear, "fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence...and physical and mental condition" as well as his good faith. 20 C.F.R. § 404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person

who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. (citation omitted). 442 U.S. at 696, 697, 61 L.Ed.2d at 189, 190.

It is clear from Califano v. Yamasaki that credibility will frequently be a crucial question in waiver of recoupment of overpayment cases such as the present case. In the present case, if credibility is determined in favor of Mr. Exner, waiver of overpayment is appropriate. Mr. Exner's testimony indicates he notified the Secretary on June 7, 1979 of the date he would be starting work and the salary he would make. He has argued both to the district court and the Court of Appeals that such notification is sufficient to

meet the requirements of the Act and the Secretary's regulations including 20 C.F.R. § 416.552, Waiver or adjustment of recovery--without fault.

Likewise, Mr. Exner's testimony and written submissions as to his income show that waiver is appropriate under 20 C.F.R. § 416.553 which defines "defeat the purposes of the Supplemental Security Income program" and 20 C.F.R. § 416.554 which defines "against equity and good conscience."

Mr. Exner's testimony as to his reliance upon information from an official source within the SSA that Mr. Exner need do nothing further until October of the following year, if believed, also provides him with a valid defense. A recipient who justifiably relies on erroneous information from an

official source within the SSA is without fault. Califano v. Yamasaki, 442 U.S. at 685, 686, 61 L.Ed.2d at 183. See also, 20 C.F.R. § 404.510a.

Mr. Exner's testimony, if believed, also shows that he was under severe mental and emotional stress at the time the overpayment was made. His son, Anthony, suffered from cerebral palsy and epilepsy which required extensive medical treatment and associated travel. Anthony's condition also strained the family budget to such an extent that there was insufficient funds to meet all necessary living expenses. On top of these facts, Mr. Exner's marriage was breaking up. In order to determine whether he was without fault, it is absolutely essential that these factors be considered and weighed. The

Secretary's final decision did not do so and, in the absence of a credibility determination, it is impossible to weigh such factors.

The district court did not conduct, and could not conduct, a de novo hearing where the district court judge could determine Mr. Exner's credibility. Where the Secretary has failed to make findings upon the crucial issue of credibility, the decision of both the district court and the Court of Appeals directly conflicts with prior decisions of this Court which justifies granting a writ of certiorari.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

In Schwingel v. Harris, 631 F.2d 192 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit held, in an SSI overpayment case, that plaintiff's credibility was important and she was entitled to a finding on the issue by an agency official who heard her testimony. 631 F.2d at 197, 198. In Schwingel, the Social Security Appeals Council had reversed a favorable decision of an ALJ, who never reached the credibility issue, and denied recovery of overpayment finding her to be not without fault. As in Schwingel, the ALJ who heard Mr. Exner's testimony in the present case made no finding at all as to credibility. If the Appeals

Council of the SSA cannot supply such a finding, a United States district court, as in the present case, should not be able to do so by merely declaring that the Secretary has determined credibility against the claimant when the Secretary's final decision contains absolutely no discussion of credibility at all.

In Viehman v. Schweiker, 679 F.2d 223 (11th Cir. 1982), the court held that where a claimant's testimony was critical in determining whether he was without fault in accepting an overpayment of disability benefits, it was necessary for the finder of fact to articulate any specific or other reasons for questioning his credibility. The decision of the United States Court of Appeals for the Fourth Circuit in the

present case directly conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit in Viehman v. Schweiker.

The failure of the Secretary to make credibility findings in disability cases has caused at least two United States Courts of Appeals to hold that if the Secretary refuses to credit subjective pain testimony, he must do so explicitly and give reasons for that decision, and where he fails to do so, he has accepted that testimony as true as a matter of law. MacGregor v. Bowen, 786 F.2d 1050 (11th Cir. 1986); Varney v. Secretary of HHS, 859 F.2d 1396 (9th Cir. 1988).

Although many of the decisions of the United States Courts of Appeals which require specific findings when

challenging credibility involve testimony about pain, see, e.g., Gaimer v. Secretary of HHS, 815 F.2d 1275, 1279 (9th Cir. 1987), Petitioner cannot imagine any reason as to why credibility decisions in overpayment cases should demand less particularized findings.

The majority of United States Courts of Appeals require detailed findings on important issues in Social Security cases.¹

¹ First Circuit: Small v. Califano, 565 F.2d 797 (1st Cir. 1977) (Secretary has an obligation to make full and detailed findings in support of his ultimate conclusion.)

Second Circuit: Donato v. Secretary of HHS, 721 F.2d 414 (2d Cir. 1983) (ALJ must make credibility findings when there is conflicting evidence with respect to a material issue.)

Third Circuit: Cotter v. Harris, 642 F.2d 700 (3rd Cir. 1981) (Examiner's findings should be as comprehensive and analytical as feasible.) CONTINUED ON NEXT PAGE

Only the United States Court of Appeals for the Fifth Circuit appears to allow for findings which reach a conclusion on an important issue by inference. Johnson v. Heckler, 767 F.2d 180 (5th Cir. 1985). In the present

Baerga v. Richardson, 500 F.2d 309 (3rd Cir. 1974) (Examiner's findings should be as comprehensive and analytical as feasible.)

Sixth Circuit: Shelman v. Heckler, 821 F.2d 316 (6th Cir. 1987) (ALJ required to set forth some basis for rejecting opinions of treating physicians.)

Seventh Circuit: Garfield v. Schweiker, 732 F.2d 605 (7th Cir. 1984) (Decision of the ALJ will be based on consideration of all relevant evidence and the reasons for his conclusions will be stated in a manner sufficient to permit an informed review.)

Eighth Circuit: Herbert v. Heckler, 783 F.2d 128 (8th Cir. 1986) (The Secretary must demonstrate that she evaluated all the evidence.)

Tenth Circuit: Huston v. Bowen, 838 F.2d 1125 (10th Cir. 1988) (Findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in disguise of findings.)

case, the findings made by the ALJ do not even inferentially reach the conclusion that Mr. Exner's testimony was not credible. Indeed, if any inference can be drawn from the ALJ's decision with regard to credibility, it would be that the ALJ found Mr. Exner to be credible. Nowhere in his discussion of the evidence does the ALJ even mention any evidence in the record from which an intention to impeach credibility might be inferred.

From the foregoing discussion, there can be no doubt that the decision of the United States Court of Appeals for the Fourth Circuit, affirming a decision by the district court that the Secretary of Health and Human Services made an adverse credibility decision in Mr. Exner's case, when the final

decision of the Secretary shows no such determination, clearly conflicts with the decisions of other United States Courts of Appeals, thus justifying the grant of a writ of certiorari.

III. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS SO FAR SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The United States Court of Appeals for the Fourth Circuit appears to have failed to follow its own prior case law in the present case. While the Fourth Circuit has never decided the question of credibility in an overpayment case, it has held:

Unless the Secretary has examined all the evidence and has sufficiently explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of the

court's "duty to scrutinize the record as a whole to determine that the conclusions reached are rational." Gordon v. Schweiker, 725 F.2d 231, 236 (4th Cir. 1984), quoting Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977).

Indeed, the United States Court of Appeals for the Fourth Circuit has repeatedly reversed the Secretary for failing to make clear and explicit findings and indicate the reasons for such findings. Cook v. Heckler, 783 F.2d 1168 (4th Cir. 1986); Smith v. Heckler, 782 F.2d 1176 (4th Cir. 1986); Maxey v. Califano, 598 F.2d 874 (4th Cir. 1979); Smith v. Califano, 592 F.2d 1235 (4th Cir. 1979); Thorne v. Weinberger, 530 F.2d 580 (4th Cir. 1976). In pain cases, the United States Court of Appeals for the Fourth Circuit requires an ALJ to make credibility determinations and to refer specifically to

evidence informing the ALJ's conclusion as to credibility. Hammond v. Heckler, 765 F.2d 424, 426 (4th Cir. 1985).

The United States Court of Appeals for the Fourth Circuit has also held that prior decisions of that court are binding unless and until they are reconsidered en banc. Doe v. Charleston Area Medical Center, 529 F.2d 638, 642 (4th Cir. 1975).

The above decisions by the United States Court of Appeals for the Fourth Circuit appear to require specific findings upon all issues which may affect the outcome of a social security case. While none of them involve recoupment of overpayment, counsel for Petitioner can imagine absolutely no reason for adopting a different standard in a waiver of overpayment case. Certainly, neither

the decision by the Court of Appeals in the present case, nor the decision by the United States District Court point to any such reason.

The United States District Court in the present case held that an adverse credibility decision was made when the record clearly shows upon its face that no such adverse credibility decision was made by the Secretary of Health and Human Services. Counsel for Petitioner can find no case where this Court, or any other federal court, has ever sanctioned such a finding by United States District Court. The prior decisions of this Court, of other federal courts of appeals, and of the United States Court of Appeals for the Fourth Circuit all consistently require that the Secretary determine credibility. For a United

States district court to hold that the Secretary has made an adverse credibility determination, when the Secretary's decision not only fails to make such a determination but the facts discussed in that decision will not even permit an inference that credibility was decided against a claimant, such a departure from the usual course of judicial procedure has occurred as to justify invoking this Court's supervisory power.

Petitioner is unable to offer any explanation of why both the District Court and the Court of Appeals in the present case held that the Secretary had made an adverse credibility determination when, in fact, he had not done so. Possibly the burden placed upon the lower federal courts by increasing case-

loads may have caused this fact to be overlooked. Petitioner, however, clearly called the failure of the Secretary to make credibility findings to the attention of both the United States District Court, App. A-206-220, and the United States Court of Appeals for the Fourth Circuit, App. A-221-248.

As the population of this country advances in age, and particularly as the "baby boom" generation becomes older, this Court can expect a continuing increase in the number of Social Security cases which burden the lower federal courts. Under circumstances such as these, it is essential that credibility determinations be made by the Secretary in the first instance as required by 42 U.S.C. § 405(b) in cases where credibility is an issue. If

overburdened courts make mistakes, such as those in the present case regarding credibility findings, and such mistakes are allowed to go uncorrected on appeal, our nation will have taken a step upon a road which leads from the rule of law toward anarchy and chaos. Statutory protections, prior decisions by this Court, binding precedent, and due process of law itself become absolutely meaningless if errors, such as that made upon the issue of credibility by the district court in the present case, are not corrected.

As this Court pointed out in Schweiker v. Chilicky, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 370, 381 (1988), the Social Security Act is unusually protective of claimants. Such protection, contained in the Act, is worthless

if a case, such as the present one, is allowed to slip by. Petitioner, in the present case, has no Bivens action available to him, Schweiker v. Chilicky, supra, for denial of due process of law. The grant of the writ of certiorari in the present case is his last hope for the correction of an error made by the district court which is clear upon the face of the record.

IV. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE PRESENT CASE UPON THE ISSUE OF THE LEGAL STANDARD TO DETERMINE DEFAULT JUDGMENT AGAINST THE UNITED STATES AND A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

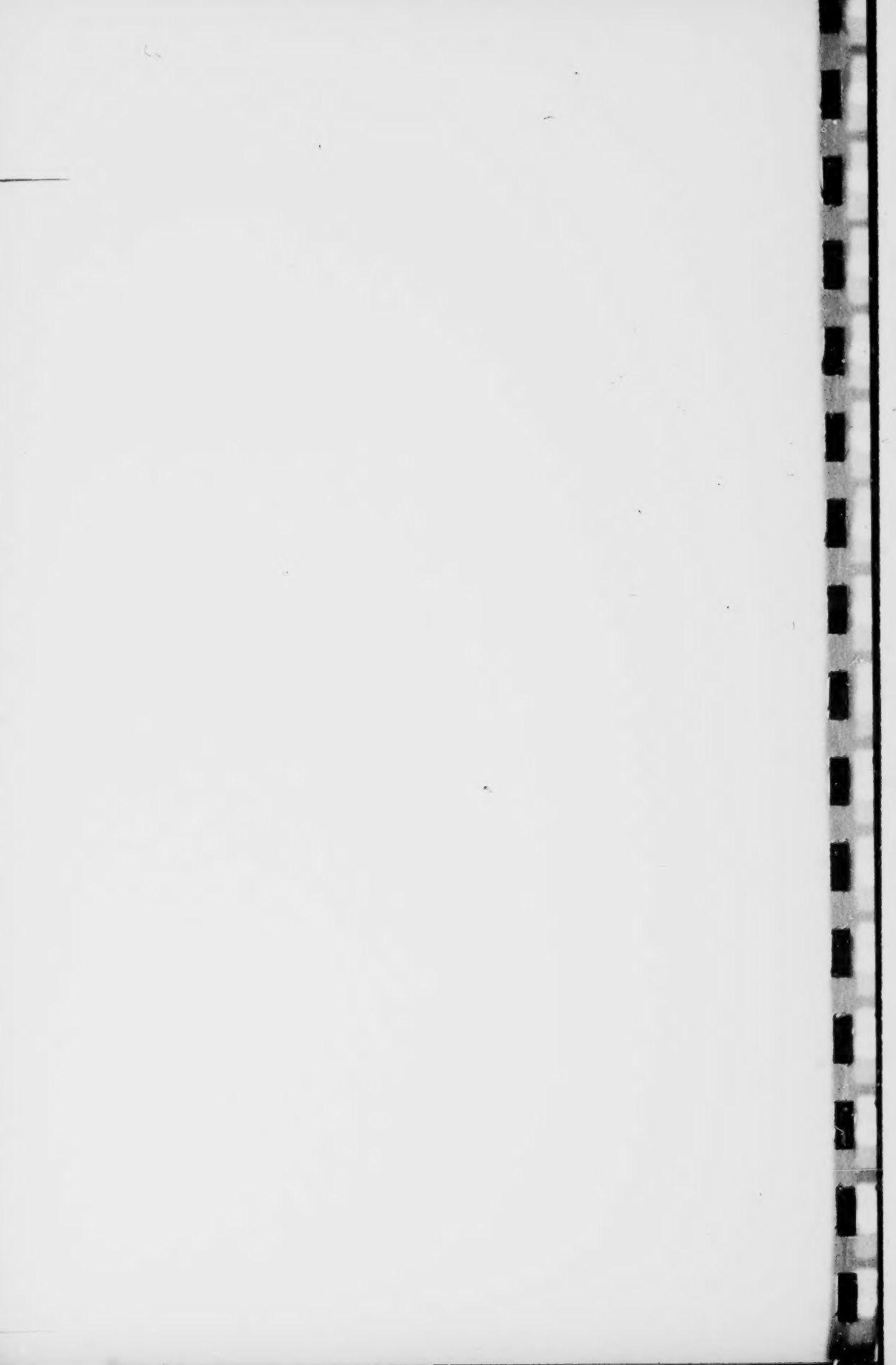
After the Secretary failed to comply with court scheduling orders in the present case, Petitioner moved for sanctions including entry of default and de-

fault judgment as allowed by Rule 55 of the Federal Rules of Civil Procedure. App. A-179. In ruling upon that motion, the United States District Court held:

However, default judgment is an extreme result, and, in order to warrant default against the United States, the plaintiff must have an uncontroverted claim for relief. The court cannot say to its satisfaction on the record and evidence before the court that the plaintiff has satisfied this burden in establishing an unqualified right to default judgment. App. A-17.

The above ruling, affirmed by the United States Court of Appeals for the Fourth Circuit in the present case, directly conflicts with the decision of the United States Court of Appeals for the First Circuit in Alameda v. Secretary of HEW, 622 F.2d 1044 (1st Cir. 1980), a case very similar to the present one, which the court held the

failure to file requested legal memoranda in support of the Secretary's administrative decision amounted to a failure to otherwise defend the suit within the meaning of Rule 55(a) of the Federal Rules of Civil Procedure. According to Alameda, the limitation against default judgments contained in Rule 55(e) of the Federal Rules of Civil Procedure does not prohibit an entry of default against the United States, and does not relieve the government from its duty to defend cases and obey court orders. The court in Alameda further pointed out that the requirement that default judgments may issue against the United States only if a claimant establishes a claim or a right to relief by evidence satisfactory to the court did



not deprive the district court of authority to respond to the Secretary's failure to file legal memoranda by striking denials of the Secretary's answer and finding claimant's entitlement to the benefits based upon plaintiff's brief pointing out lack of sufficient evidence in the administrative transcript for the Secretary's conclusion. As the court said in Alameda v. Secretary of HEW, 622 F.2d at 1049:

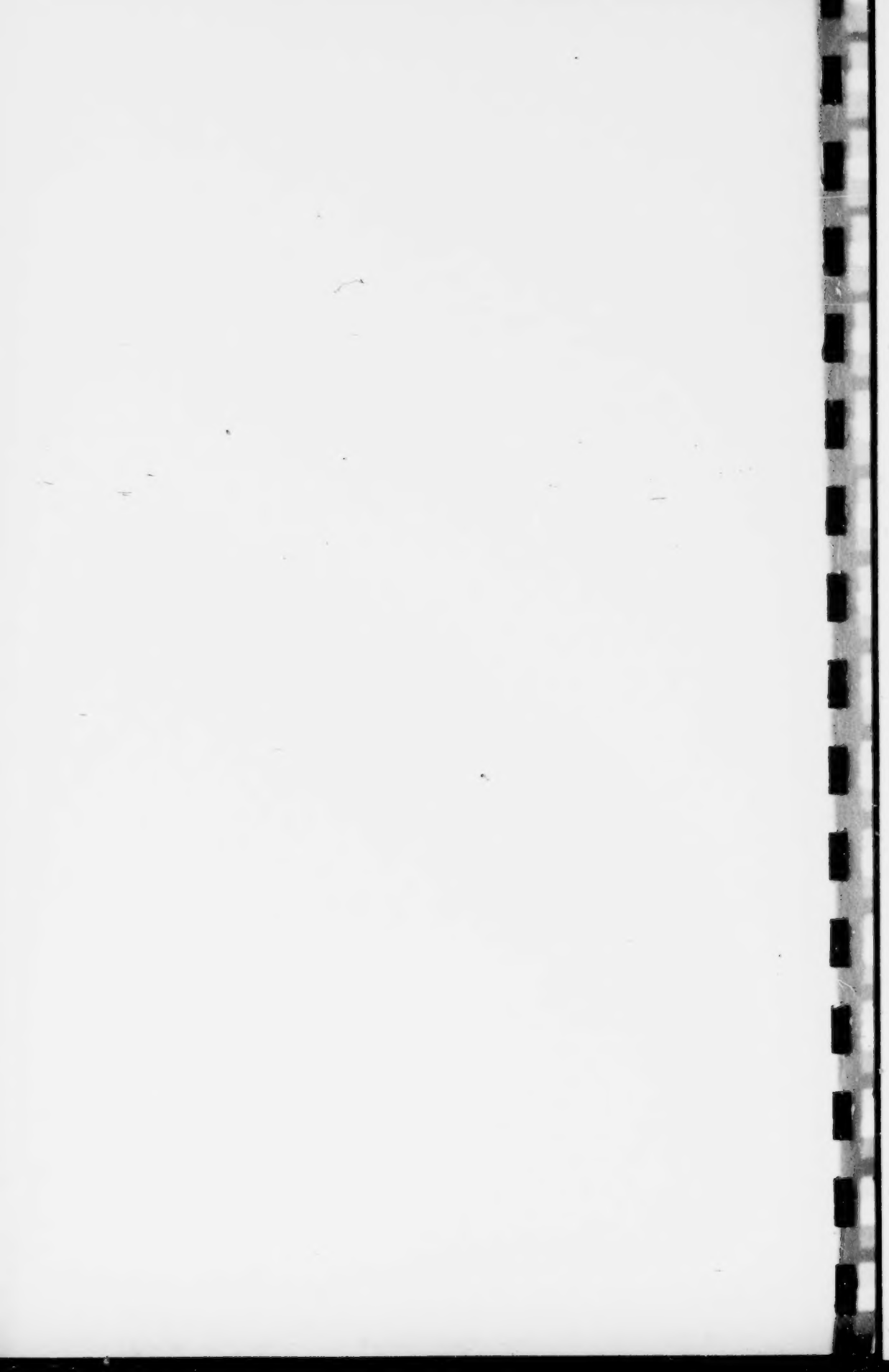
Should a district court finding for the claimant be appealed to us, the scope of our review would be limited by the terms of Rule 55(e). We would not easily set aside the judgment if the entry of default was justified and the claimant's district court brief and reference to the record appeared relevant, fair and reasonably comprehensive. If the brief should entirely lack these virtues or refer to evidence supporting the Secretary's decision that was

clearly "substantial", we would have no choice but to reverse. Nonetheless, if the district court and we have been put in the predicament of flying on one wing, the flight need not be lengthy. We emphasize that our concern will not be with examining the record for sub-stantial evidence, but with assuring ourselves that the district court properly applied Rule 55(e).

The United States Court of Appeals for the Second Circuit in Marziliano v. Heckler, 728 F.2d 151 (2d Cir. 1984), has adopted the standard set forth by the First Circuit in Alameda. In Giampaoli v. Califano, 628 F.2d 1190 (9th Cir. 1980), the court appears to have affirmed what was essentially a default judgment against the Secretary for failure to otherwise defend, while calling it a judgment on the merits rather than a default judgment.

Although Wright, Miller, and
Cooper, Federal Practice and Procedure,
§ 2702, p. 548 et seq., indicates that
the preferable view is that Rule 55(e)
precludes any default judgment for
procedural violations against the United
States, this has certainly not been the
view taken by the federal courts in the
above cases. This view also does not
comply with the language of Rule 55(e).

The grant or denial of a motion to
enter a default judgment lies within the
sound discretion of the district court
and will be reversed only for abusive
discretion. See, e.g., Dundee Cement
Co. v. Howard Pipe and Concrete
Products, Inc., 722 F.2d 1319 (7th Cir.
1983). As this Court said in Albemarle
Paper Co. v. Moody, 422 U.S. 405, 416,

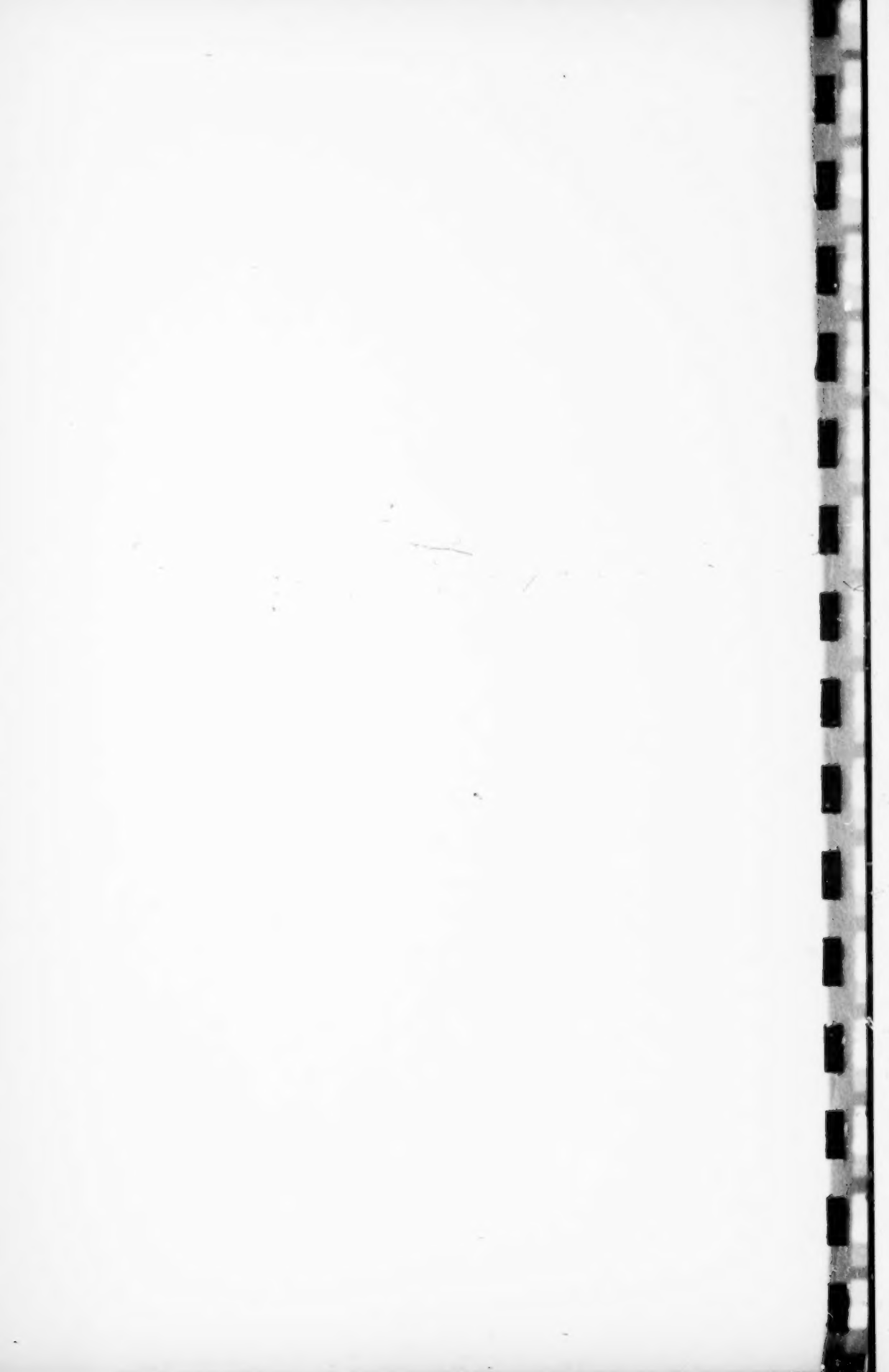


95 S.Ct. 2362, 45 L.Ed.2d 280, 296
(1975):

...discretionary choices are not left to a court's "inclination" but to its judgment; and its judgment is to be guided by sound legal principles." United States v. Burr, 25 F.Cas. 30, 35 (C.C.Va. 1807) (Marshall, C.J.)

In Collins v. Seaboard Coastline Railroad, 681 F.2d 1333 (11th Cir. 1982), the court pointed out that in review and exercise of discretion under the abusive discretion standard, it is important to examine the premises upon which discretion is exercised. The court in that case further said:

By very definition, however, an exercise of discretion could resolve the matter either way and still be affirmed, assuming the result is not beyond the permissible scope of discretion. A discretionary decision that falls within permitted bounds, but is based on false premises, raises the question on review as to whether the



trial court would have come to the same conclusion using proper premises. That it could have does not satisfy the inquiry as to whether it would have reached the same result. The affirmance of a discretionary decision that is based on an improper view of the facts or the law merely reflects the appellate court's exercise of discretion that rightfully belongs to the trial court. The proper role of appellate review permits a remand for further proceedings when a discretionary decision has been made on false premises. 681 F.2d at 1335.

The standard used by the trial court in the present case would require a denial of default judgment whenever there is any controverted claim for relief. Whenever an answer has been filed denying any of the allegations of a complaint, the claim for relief has, at least to some extent, been controverted. Rule 55(a) of the Federal Rules of Civil Procedure makes sanctions,



including entry of default and default judgment, available not only for failure to file an answer, but also for failure to otherwise defend an action. (emphasis added). Rule 55(e) of the Federal Rules of Civil Procedure does not prohibit an entry of default and default judgment against the United States, but merely requires the existence of some evidence upon which to base the judgment.

In the present case, there can be no doubt that the Secretary failed to comply with court scheduling orders, and otherwise delayed this case. Plaintiff did not seek default judgment prior to the filing of an answer because, without the administrative record, there would be no evidence properly before the Court upon which the Court could determine

this matter as required by Rule 55(e) of the Federal Rules of Civil Procedure and 42 U.S.C. § 405(g). Poe v. Mathews, 572 F.2d 137 (6th Cir. 1978).

By utilizing a standard which requires an uncontroverted claim for relief, the district court in the present case has made it impossible for a plaintiff to ever obtain a default judgment against the United States once an answer has been filed, no matter how egregious a subsequent failure to "otherwise defend" may be. Such a decision makes the "otherwise defend" language of Rule 55(a) meaningless in actions against the United States government. Rule 55(e) of the Federal Rules of Civil Procedure already provides the United States with a preferred position to other litigants so far as

default judgments are concerned. Extension of that protection to prohibit the possibility of an entry of default judgment after an answer is filed, regardless of the conduct of the United States in later stages of the proceedings, is to remove from the district court a sanction which the rules contemplate that court shall have.

It is important that the district court have the sanction of default judgment available against the United States where the evidence will permit its entry and the government has "otherwise failed to defend" a case. Sanctions other than default, such as contempt, or monetary fines, may require ongoing court attention greatly increasing already overburdened federal district courts. Indeed, the expense of

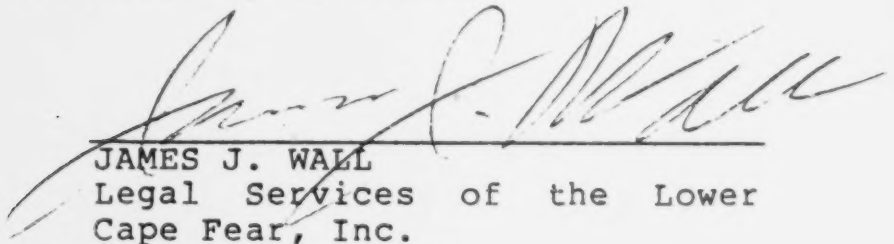
administering sanctions such as contempt, or fines, may cost the taxpayers more money than the amount in controversy would justify if default were entered. Flexibility, to the full extent allowed by the rules of civil procedure, is needed by the federal district courts under such circumstances.

The question of when a federal district court may enter a default judgment against the United States is a serious and important question of federal law which this Court has not addressed, but needs to address. Therefore, the Petition for Writ of Certiorari should be granted so that the Court may resolve this issue as well as resolve a conflict between the circuits.

CONCLUSION

For these various reasons, the petition for certiorari should be granted so that this Court may resolve the issues presented herein.

Respectfully submitted.



JAMES J. WALL
Legal Services of the Lower
Cape Fear, Inc.
106 Market Street
Post Office Box 814
Wilmington, North Carolina
28402-0814
(919) 763-6207

COUNSEL FOR RECORD

89-162

Supreme Court, U.S.

FILED

JUN 27 1989

JOSEPH F. SPANIOLO, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

STANLEY EXNER,
PETITIONER,

v.

LOUIS W. SULLIVAN,
Successor in Office to
OTIS R. BOWEN, SECRETARY
OF HEALTH AND HUMAN SERVICES,
RESPONDENT.

APPENDIX TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

JAMES J. WALL
Legal Services of the Lower Cape Fear,
Inc.
106 Market Street
Post Office Box 814
Wilmington, North Carolina 28402-0814
(919) 763-6207

COUNSEL OF RECORD

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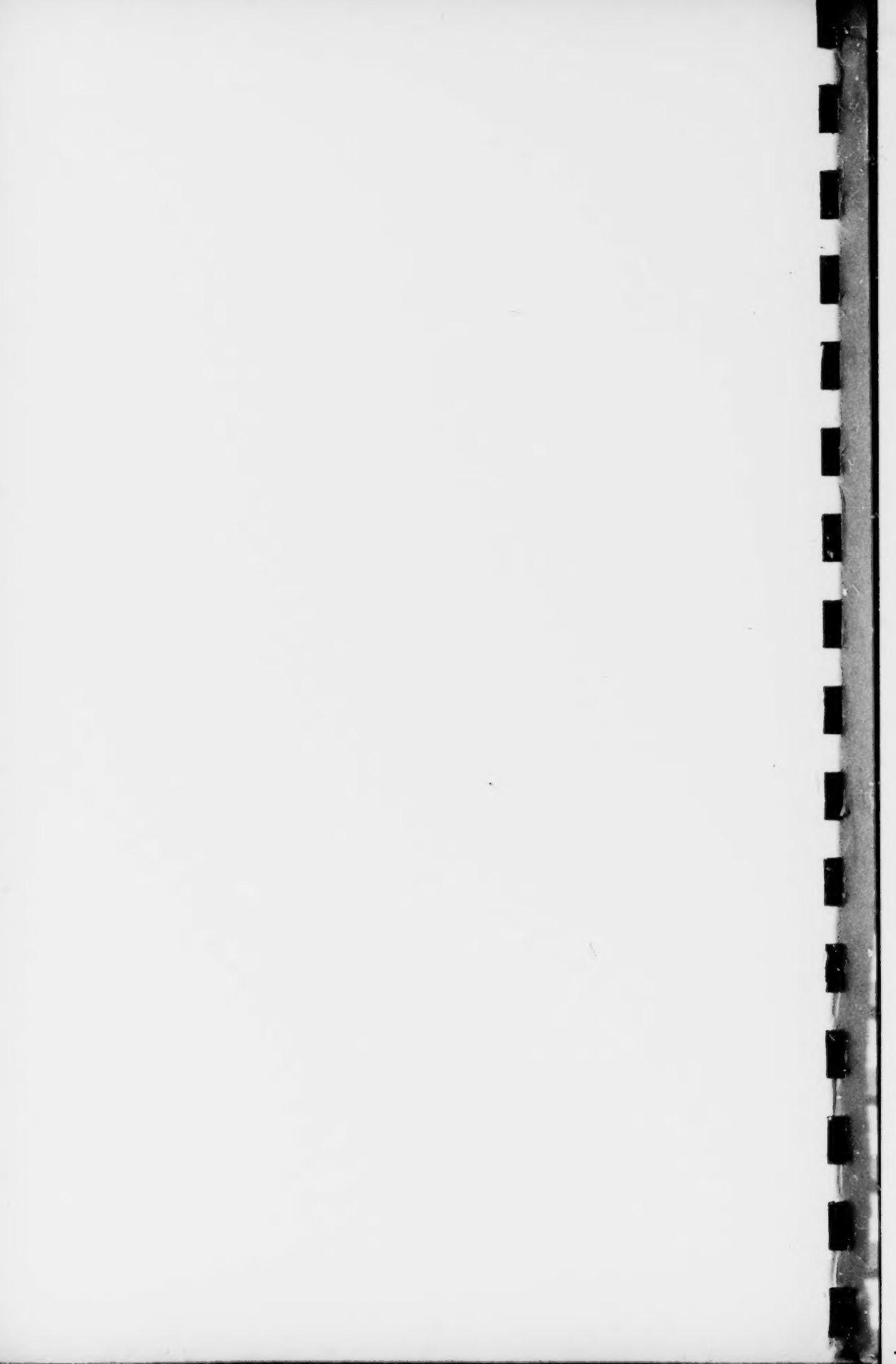


TABLE OF CONTENTS

	PAGE
Opinion below.....	A-4
Order Denying Motion for Judgment on the Pleadings.....	A-7
Order Denying Motion for Default Judgment.....	A-14
SSI Decision--Denial (11/22/85).....	A-19
Order Denying Rehearing En Banc.....	A-40
Notice of Issuance of Mandate.....	A-42
Judgment.....	A-44
Hearing Transcript.....	A-46
Application for SSI (Individual)...	A-116
Statement of Income and Resources.....	A-134
SSI Overpayment and Disposition Determination (1/19/81).....	A-155
Overpayment Worksheet.....	A-159
Reports of Contact (3).....	A-161
Request for Reconsideration.....	A-168

SSI Notice of Reconsideration.....	A-177
Overpayment Recovery	
Questionnaire.....	A-192
SSI Overpayment and Disposition	
Determination (11/26/84).....	A-206
Petitioner's Financial Report.....	A-212
Petitioner's Motion for Judgment on	
the Pleadings or Summary Judgment..	A-214
Respondent's Motion for Extension	
of Time.....	A-217
Petitioner's Response and Motion...	A-220
Order Granting Respondent's	
Extension.....	A-223
Petitioner's Motion for Entry	
of Default and Default Judgment....	A-225
Respondent's Motion for	
Permission to File Out of Time.....	A-229
Order of Repayment.....	A-232

Petitioner's Motion to Alter or Amend Judgment (Rule 59 F.R.Civ.P.).....	A-237
Respondent's Response.....	A-243
Order Granting Petitioner's Motion to Vacate Order of Judgment.....	A-249
Respondent's Response to Petitioner's Motion for Judgment...	A-254
Petitioner's Memorandum in Support of Motion for Judgment.....	A-257
Petitoner's Appellate Brief.....	A-273
42 U.S.C. § 405(b).....	A-302
42 U.S.C. § 405(g).....	A-304
42 U.S.C. § 1383(b) (1).....	A-308
42 U.S.C. § 404(b).....	A-312
20 C.F.R. § 416.552.....	A-312
20 C.F.R. § 416.553.....	A-315
20 C.F.R. § 416.554.....	A-318
20 C.F.R. § 404.510a.....	A-320
Rule 55, F.R.Civ.P.....	A-322

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3968

STANLEY A. EXNER,

Appellant,

versus

OTIS R. BOWEN, SECRETARY,

DEPARTMENT OF HEALTH AND

HUMAN SERVICES,

Appellee.

Appeal from the United States District
Court for the Eastern District of North
Carolina, at Raleigh. Terrence W.
Boyle, District Judge. (CA-86-59-4-CIV)

Submitted: June 30, 1988

Decided: December 15, 1988

Before WIDENER, PHILLIPS, and WILKINSON,
Circuit Judges.

James J. Wall, Marcus W. Williams (LEGAL SERVICES OF THE LOWER CAPE FEAR) for Appellant. R. A. Renfer, Jr. (OFFICE OF THE U. S. ATTORNEY), Donald A. Gonya, Randolph W. Gaines, John M. Sacchetti, Stanley Ericsson (U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES) for Appellee.

PER CURIAM:

Stanley A. Exner appeals from the district court's order affirming the decision of the Secretary of Health and Human Services requiring Exner to repay \$3688.40 in overpayment of Supplemental Security Income benefits for his disabled child. Our review of the

record and the district court's opinion discloses that his appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Exner v. Bowen, CA-86-59-4-CIV (E.D.N.C. Jan. 8, 1988). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
No. 86-59-CIV-4

STANLEY A. EXNER,)

Plaintiff)

v.) ORDER

)

OTIS R. BOWEN,)

Secretary of)

Health & Human)

Services,)

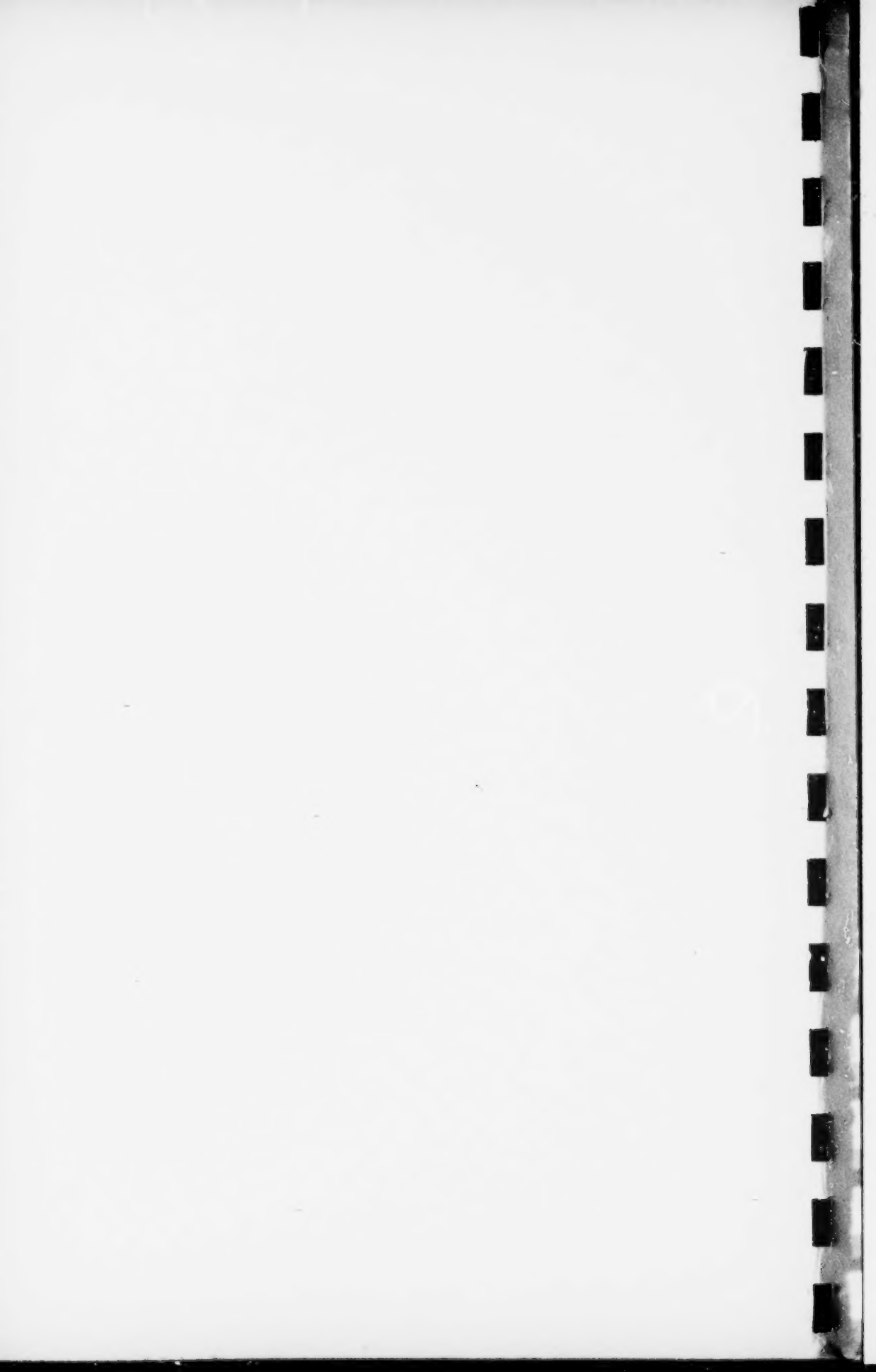
Defendant)

This matter comes before the court upon the plaintiff's motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff, Stanley A. Exner, claims that no genuine issues of material fact exist and that he is entitled to judgment.

Exner is the father of a disabled child. In June of 1979, Exner applied for SSI disability benefits for his child. At that time, Exner was not working, and he told the Social Security clerk handling his application for benefits that he expected to begin employment in the future under the federal civil service. Exner claims that the Social Security representative simply told him that filling out an annual income statement was the only requirement for receiving SSI benefits. Exner subsequently reported his employment in a disclosure in September of 1980. In August of 1979, plaintiff had received notice from the Social Security Administration that included a statement, among other remarks, that he should report any

changes in his income or resources to the Administration. However, Exner as the representative payee, continued to receive SSI benefits for his child during the period of September, 1979 through December, 1980 in the amount of \$3,688.40.

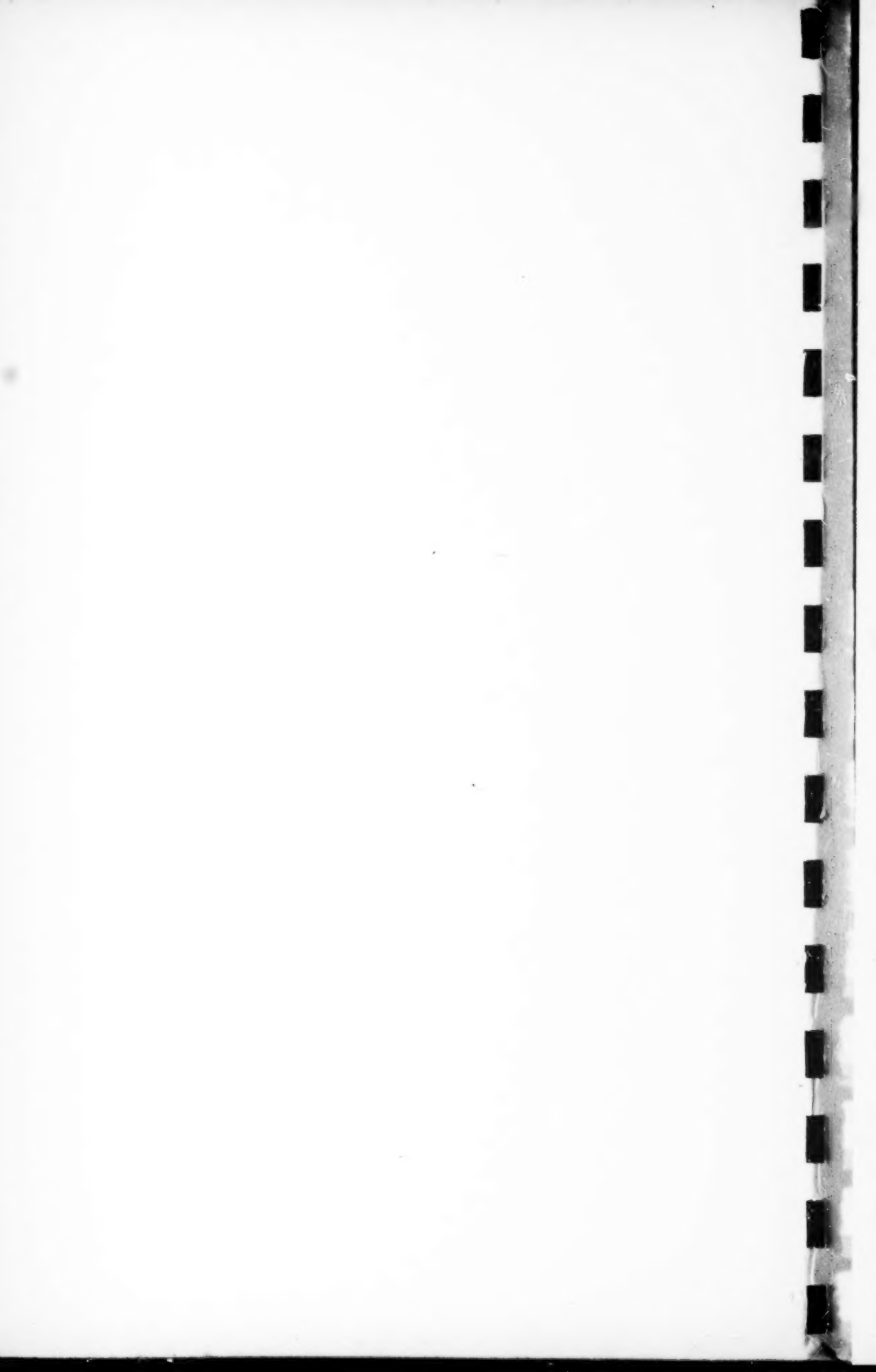
The Social Security Administration notified Exner in November of 1984 that it would seek to recover the overpayment. A hearing was held before an Administrative Law Judge on November 7, 1985. Thereafter, the Administrative Law Judge issued a decision holding that Exner was not without fault because he failed to promptly report a change in income and ordered repayment. The Appeals Council and the Secretary affirmed the Administrative Law Judge's decision. Exner has exhausted his



administrative remedies, and the case is now properly before this court for review.

Exner contends that he is without fault in failing to make a timely report of his return to work and increased income. Exner further contends that he is entitled to a waiver of recovery of overpayment he incurred as the representative payee for his child.

The Social Security Act allows a waiver of recovery of overpayments only if the plaintiff can show that he was without fault and is unable to pay. Both the without fault and the inability to repay provisions must be favorably resolved before a plaintiff is entitled to waiver of recovery of the overpayment. Shutt v. Secretary of Health, Education and Welfare, 490 F.2d



43 (5th Cir. 1974). The Administrative Law Judge found that the plaintiff was not without fault; consequently, consideration of Exner's ability to repay was unnecessary.

The Administrative Law Judge fully considered the evidence and Exner's testimony. Exner contends that he was never told it would be necessary to report any change in income, but the August, 1979 letter stated that "if income or resources for him or members of his household changed," that Exner was required to file a report. Furthermore, the letter stated that any change in his work status must be reported to the Social Security Administration.

Exner also argues that he was misled or misinformed by the Social

Security Administration representative who handled his application. However, Exner has not submitted any documentation or evidence that he was informed contrary to information contained in the application letter and the decision letters. The Administrative Law Judge considered Exner's testimony but chose not to find him fully credible. Credibility decisions are the functions of the Secretary, not the courts. Richardson v. Perales, 402 U.S. 389 (1979). An Administrative Law Judge would have to make a serious error in reasoning for this court to overturn his decision regarding the credibility of an applicant.

Exner pleads that he did not know about the requirements to inform the

Social Security Administration of a change in his work status and income level. However, there is substantial evidence for the Administrative Law Judge to base his decision and upon which he could find Exner not fully credible. Exner's pleadings do not show that the Administrative Law Judge's opinion was not based on substantial evidence or that the judge made a serious error in reasoning. Exner's motion for judgment on the pleadings is hereby DENIED. Therefore, the Administrative Law Judge's decision is AFFIRMED.

SO ORDERED this 7th day of January, 1988.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE

UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
No. 86-59-CIV-4

STANLEY A. EXNER,)

Plaintiff)

)

v.)

ORDER

)

OTIS R. BOWEN,)

M.D., Secretary)

of Health and)

Human Services,)

Defendant)

This case arises from an appeal to this court from the adverse ruling of the Secretary involving an overpayment of Supplemental Security Income to the

plaintiff. The plaintiff is the father of a disabled child. On June 7, 1979, plaintiff applied for SSI disability benefits. At that time the plaintiff was not working. He told the Social Security clerk handling his application for benefits that he expected to begin employment in the future under federal civil service at Camp Lejuene (sic), North Carolina. There is some confusion about the response by the Social Security clerk, but the court will consider the evidence in the light most favorable to the plaintiff and accept that the Social Security representative either ignored the comment or told the plaintiff not to be concerned about his prospective employment; that a form would be sent in October of the next year which the claimant could then fill



out to determine if his son was still eligible for Supplement Security Income.

The plaintiff then reported his employment in a disclosure of September 1980.

In August of 1979 the plaintiff received notice from the Social Security Administration that included a statement, among other remarks, that he should report any changes in his income or resources to the Administration.

The plaintiff has urged the court to enter a default against the Secretary and to enter default judgment. Rule 55(e) of the Federal Rules of Civil Procedure provides that no judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim of right to relief by evidence



satisfactory to the court. The court is of the opinion that on the record before it the plaintiff has failed to present evidence which is satisfactory for default judgment against the United States. The fact that the Secretary has been dilatory in his filings and responses in this case is in no way condoned by the court.

However, default judgment is an extreme result, and, in order to warrant default against the United States, the plaintiff must have an uncontroverted claim for relief. The court cannot say to its satisfaction on the record and evidence before the court that the plaintiff has satisfied this burden in establishing an unqualified right to default judgment.

Among other grounds for relief, the plaintiff has requested the court in the alternative to remand the case for a further hearing by the Secretary in order to properly apply the evidence to the law. The fact that there is a controversy regarding the correctness of the Secretary's determination of the facts further supports this court's unwillingness to enter default judgment against the Secretary in this case.

The motion for default judgment is DENIED.

SO ORDERED · this 3rd day of December, 1987.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE

UNITED STATES DISTRICT JUDGE

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Office of Hearings and Appeals

Name and Address of Claimant:

Mr. Stanley R. Exner

for Anthony Exner

2000 Oakwood Drive

Jacksonville, NC 28540

NOTICE OF DECISION -- DENIAL

PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you have the right to request the Appeals Council to review it within 60 days from the date of receipt of this notice. It will be presumed that you received this notice within 5 days after the date shown below unless you show us that you did not receive it within the 5-day period.

You (or your representative) may file the request for Appeals Council review of your case at your local Social Security office or at the hearing office. The request can be made either in person or by mailing a letter to these offices. You may also mail the request for review directly to the Appeals Council, Office of Hearings and Appeals, P. O. Box 3200, Arlington, VA 22203.

Unless you timely request review, you may not obtain a court review of your case (sections 205(g), 1631(c)(3) or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed

November 22, 1985

CC:

Name and Address of Representative:

Mr. Michael Glancy

Legal Services of the Lower Cape Fear

P. O. Box 814

Wilmington, NC 28402

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF: Stanley R. Exner
for Anthony Exner
CLAIM FOR: Supplemental Security
Income (Waiver of
Recovery Overpayment

Social Security Number: 220-90-0407

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The issue to be determined is whether there has been an overpayment of

supplemental security income benefits, and if so, for what month(s), and whether adjustment or recovery of the incorrect payment shall be waived. This depends on whether the overpaid individual was without fault in connection with an overpayment, and whether adjustment or recovery of such overpayment would either:

- (1) Defeat the purpose of title XVI, or
- (2) Be against equity or good conscience, or
- (3) Impede efficient or effective administration of title XVI due to the small amount involved.

APPLICABLE REGULATIONS

AND EVALUATION OF THE EVIDENCE

"Without fault" relates only to the situation of the individual seeking relief from adjustment or recovery of an

overpayment. The overpaid individual is not relieved of liability and is not "without fault" solely because the Social Security Administration may have been at fault in making the overpayment. In determining whether an individual is "not without fault", the Administration considers the individual's understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition).

Although the finding depends on all of the circumstances in the particular case an individual will be found to have been "not without fault" in connection with an overpayment when an incorrect payment resulted from one of the following:

(a) Failure to furnish information which the individual knew or should have known was material;

(b) An incorrect statement made by the individual which he knew or should have known was incorrect; or

(c) The individual did not return a payment which he knew or could have been expected to know was incorrect (20 CFR 416.552).

Adjustment or recovery of an overpayment will be considered to defeat the purpose of the supplemental security income

program if the individual's income and resources are needed for ordinary and necessary living expenses (20 CFR 416.551).

Adjustment or recovery of an overpayment is considered to be inequitable and contrary to good conscience when the overpaid individual, in reliance on such payments or on notice that such payment would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's financial circumstances are not considered (20 CFR 416.554).

"Impede administration" means that adjustment or recovery would impede efficient or effective administration of title XVI due to the small amount

involved. The amount of overpayment determined to meet such criteria is measured by the current average administrative cost of handling such overpayment case through such adjustment or recovery process. In determining whether the criteria is met, the overpaid person's financial circumstances are not considered (20 CFR 416.555).

An application for supplemental security income was filed on behalf of the child, Anthony Exner, on June 7, 1979 by his father, the claimant in this case, Stanley R. Exner (Exhibit 1). The eligibility of the child, Anthony Exner, for supplemental security income was established beginning on May 31, 1979 due to cerebral palsy (Exhibit 3). It

was subsequently determined that \$3,688.40 in supplemental security income had been overpaid on behalf of the child because of the excess income of his father, Mr. Stanley Exner (Exhibits 9 and 15). Mr. Stanley Exner had been the representative payee for his son.

After an unfavorable reconsideration of the overpayment issue, Mr. Exner requested waiver of the overpayment. After that was denied, he made a timely request for a hearing. A hearing was held in New Bern, North Carolina on November 7, 1985. Mr. Exner was advised of his right to be represented by an attorney or other qualified person of his choice and was represented by Mr. Michael Glancy, a paralegal with Legal Services of the Lower Cape Fear.

At the hearing, Mr. Exner testified that he had received supplemental security income on behalf of his child, Anthony, who suffers from cerebral palsy and epilepsy. Mr. Exner testified that the checks he received were used for the benefit of his child. Mr. Exner also testified that he and his former wife both worked after August 1979 and that his former wife was also employed in June 1979. Mr. Exner indicated that he was unemployed when the application for Anthony was filed but that he obtained a job on August 6, 1979 and has been working since that time. He stated that he did not specifically advise the Social Security Administration when he obtained a job but did advise the agency in October 1980. He also testified that

he told the person who took the application that he anticipated getting a job but was told that would be "O.K." Thereafter he stated he cooperated by submitting information regarding his earnings. Mr. Exner indicated that he separated from his first wife in 1983. Prior to that time, he indicated that his wife, who worked for a savings and loan and had worked for a credit union, had handled the family finances. He stated his former wife had taken most of the actions required to file the application for supplemental security income, although he acknowledged that he did sign the application. Mr. Exner stated that the only thing he remembered concerning the application was that he had been told he would receive information at the end of the year. He

reported that he was experiencing an emotionally trying time due to his son's illness, financial problems and his marital problems.

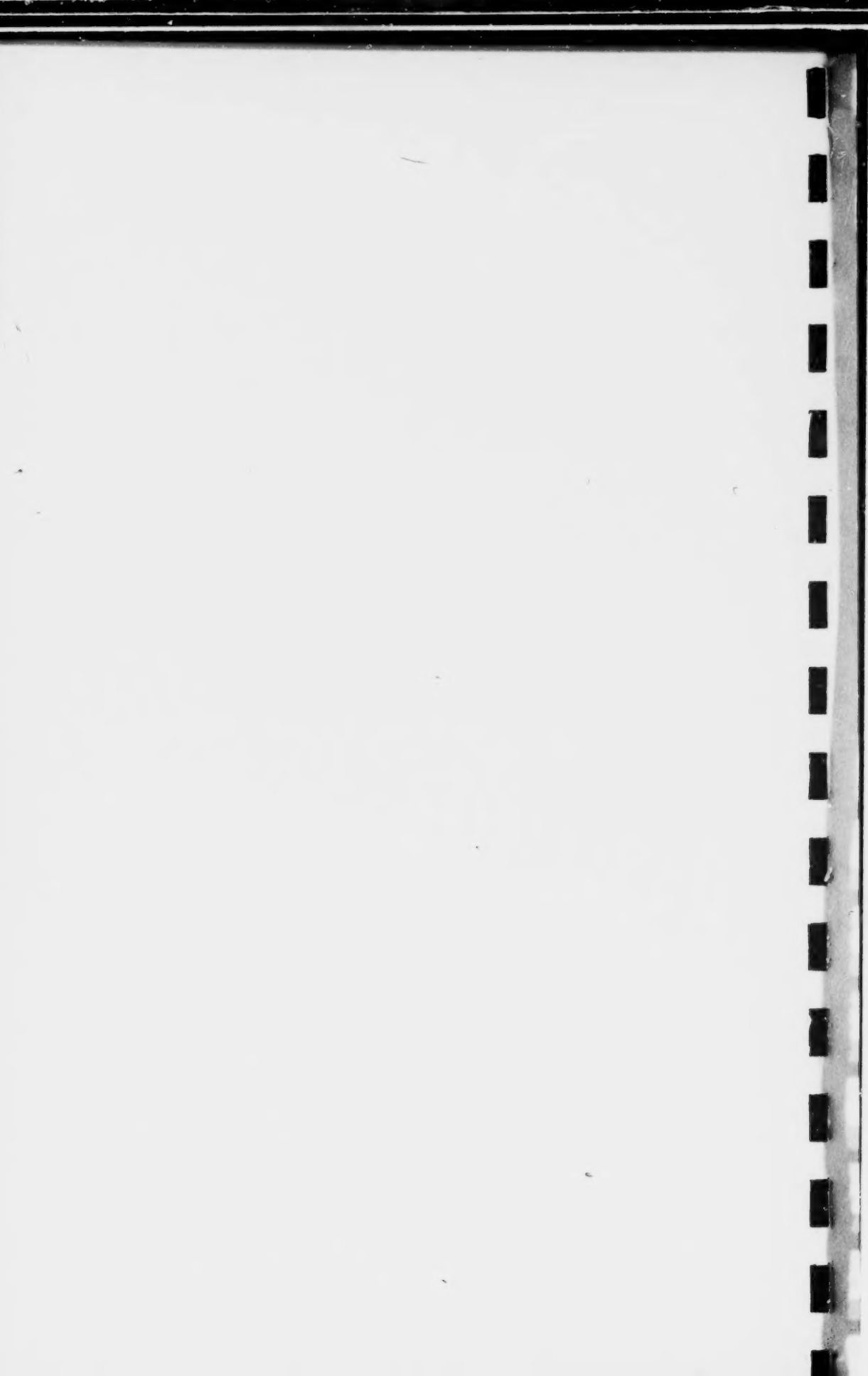
Mr. Exner testified that he had graduated from high school and had completed some college courses. He testified that he was self-employed in the real estate business in 1974 and 1978. He repeated that he felt he had been as cooperative as possible in responding to requests for information from the Social Security Administration.

The evidence establishes that the claimant was overpaid supplemental security income. Wage and tax statements and reports from employers show the income of Mr. Exner in 1979 and

1978 (Exhibits 6 and 7). Section 1614(f) of the Social Security Act provides that the income and resources of a parent living in the same household as a child under age 18 are deemed to be available to the child for the purposes of determining eligibility for, and the amount of, benefits for the child. Sections 1612 and 1613 of the Social Security Act provide for the reduction in supplemental security income payments based on excess income and excess resources. In this case, there has been no contention that the reports of Mr. Exner's income for the affected years have been incorrect. While Mr. Exner has contended that he spent the supplemental security income benefits in the best interest of the child, neither that fact nor any other fact unrelated

to income or resources can permit payment of supplemental security income to individuals whose income and resources or deemed income and resources exceed the applicable limits. Therefore, the Administrative Law Judge concludes that Mr. Exner had excess income and the child, Anthony Exner, was ineligible for supplemental security income. As a result, he was overpaid \$3,688.40.

The Social Security Act and implementing regulations provide for the waiver of the right to recover or adjust an overpayment of supplemental security income under specified circumstances. The Act and regulations provide that an overpaid individual may be relieved of the obligation to repay the overpayment



if he was both "without fault" and if at least one of three other criteria are met. These three additional criteria are that recovery or adjustment of the overpayment would either "defeat the purpose of the supplemental security income program," be "against equity or good conscience," or would "impede administration of title XVI" of the Social Security Act due to the small amount involved.

Before any of these three criteria may be examined, the individual seeking relief from adjustment or recovery of the overpayment must have been "without fault" as defined by the Social Security Act and regulations.

Section 416.552 of Social Security Regulations No. 16 provides that all relevant factors regarding the overpayment will be evaluated in determining whether an individual was "without fault." These factors are to include the individual's understanding of reporting requirements, efforts to comply and ability to comply, including factors such as age, memory and physical and mental condition. That section of the regulations further provides that an individual will be found to have been at fault in connection with an overpayment when the incorrect payment resulted from a failure to furnish information which the individual knew or should have known was material.

The application Mr. Exner signed on June 7, 1979 includes an explicit statement of his responsibilities, indicating that he was to advise the Social Security Administration immediately of any change in the family income or resources. Although Mr. Exner testified that he did not read the notice of August 8, 1979 until sometime later, that notice was directed to Mr. Exner at the mailing address he used in the application of June 7, 1979 and to which benefit checks were mailed. There is no indication that any of the correspondence directed to that address was not properly received. — Furthermore, Mr. Exner acknowledged receiving the notice but indicated that he did not read it until later. That notice restated Mr. Exner's obligations to report any change in

income or resources for his son or members of his household. If Mr. Exner's testimony is correct and he failed to read the notice until some months later, Mr. Exner failed to exercise a reasonable level of care in learning, understanding and carrying out his responsibilities as a representative payee for his son. Furthermore, the application Mr. Exner signed contains an express statement of his responsibilities. In either event, the Administrative Law Judge concludes that Mr. Exner failed to furnish information which he either knew or reasonably could have been expected to know was material to the continuing eligibility of his son for supplemental security income. Therefore, the Administrative Law Judge cannot conclude that Mr. Exner was

"without fault" in connection with the overpayment. Because an overpaid individual must first be "without fault" in connection with an overpayment for waiver to be allowed, the Administrative Law Judge must conclude that the overpayment in this case may not be waived.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant was overpaid benefits.
2. The claimant was not without fault in causing the overpayment (20 CFR 416.552).
3. Recovery of the overpayment is not waived (20 CFR 416.550).



DECISION

It is the decision of the Administrative Law Judge that the claimant was overpaid benefits; that he was not without fault in receiving and accepting the overpayment; and that recovery of the overpayment is not waived.

/s/ John F. Rafferty

John F. Rafferty

Administrative Law Judge

DATE: November 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3968

STANLEY A. EXNER,

Plaintiff-Appellant,

versus

OTIS R. BOWEN, etc.,

Defendant-Appellee.

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and the response

thereto and is of opinion the petition is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Phillips and Judge Wilkinson.

/s/ H. E. Widener, Jr.

For the Court

NOTICE OF ISSUANCE OF MANDATE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 10, 1989

TO: U. S. District Court for the
Eastern District of North Carolina
at New Bern

RE: 88-3968 Exner v. Bowen, Sec
CA-86-59-4-CIV

HEREWITH IS THE MANDATE OF THIS COURT IN
THE ABOVE-ENTITLED APPEAL. The certified
judgment and original record on appeal
are returned ONLY to the district
court/agency.

Enclosures:

- X Opinion and Certified copy of the
judgment
- Bill of costs form
- X Original record on appeal consisting
of

1 Volumes of pleadings
____ Volumes of transcripts
____ Volumes of exhibits
____ Volumes other

1 TOTAL VOLUMES

____ The record will be returned at
a later date.

----- The record was never
transmitted by the D/Ct.

____ Other _____

Please acknowledge receipt of these
documents on the enclosed copy of this
notice.

Yours truly,

JOHN M. GREACEN

Clerk

By: /s/ JEAN MOORE

Jean Moore

Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
STANLEY A. EXNER)
 v.) JUDGMENT
OTIS BOWEN, Sec.) IN A
of H & H Service) CIVIL CASE
CASE NUMBER: 86-56-CIV-4
NEW BERN DIVISION

 Jury Verdict. This action came
before the Court for a trial by
jury. The issues have been tried
and the jury has rendered its
verdict.

 X **Decision by Court.** This action came
to trial or hearing before the
Court. The issues have been tried
or heard and a decision has been
rendered.

IT IS ORDERED AND ADJUDGED

Exner's motion for judgment on the

pleadings is hereby DENIED. Therefore,
the Administrative Law Judge's decision
is AFFIRMED.

THE ABOVE JUDGMENT WAS ENTERED ON THIS
DATE, JANUARY 8, 1988 AND COPIES MAILED
TO:

Mr. James J. Wall

Legal Services of the Lower Cape Fear
Post Office Box 814

Wilmington, North Carolina 28402

Mr. Rudolph A. Renfer, Jr.

Assistant U. S. Attorney

Eastern District of North Carolina

P. O. Box 26897

Raleigh, North Carolina 27611

DATE: January 8, 1988

CLERK: J. RICH LEONARD, CLERK

/s/ Gerald T. Atkins

(By) Deputy Clerk



DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
TRANSCRIPT

In the case of: Stanley R. Exner for

A. Exner

Claim for: Supplemental Security

Income (Waiver of

Overpayment)

Wage Earner (Leave blank in Title XVI

Cases or if name is same as above)

Social Security Number: 220-90-0407

Hearing Held

at

New Bern, N.C.

(Room No., Building, Street Address,
City, State)

on

November 7, 1985

(Month, Day, Year)

by

John F. Rafferty

(Administrative Law Judge)

APPEARANCES:

Stanley R. Exner, for Anthony Exner,
Claimant

Michael Glancy, Attorney for Claimant

, Interpreter

, Witness

, Vocational Expert

INDEX OF TRANSCRIPT

In the Case of: Stanley R. Exner f/A.
Exner, Claimant

, Wage Earner

Account Number

Testimony of.....Commencing p.

Testimony of.....Commencing p.

Testimony of.....Commencing p.

Testimony of.....Commencing p.

(The following is a transcript of the hearing held before John F. Rafferty, Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services, on November 7, 1986, at New Bern, N.C., in the case of Stanley R. Exner for Anthony Exner, social security number 220-90-0407. The claimant, Stanley R. Exner, for Anthony Exner appeared in person and was represented by his attorney, Michael Glancy.)

OPENING STATEMENT BY ADMINISTRATIVE
LAW JUDGE:

ALJ: Alright, we are ready to proceed with the case of Stanley Exner for and on behalf of Anthony Exner, an

infant. Let the record show that Mr. Exner and the infant are being represented by Attorney Michael Glancy. The general issue in this case is whether or not there should be a waiver of recovery for an alleged overpayment made to the representative payee and to the infant and the specific issues on which determinations and conclusions will be made or whether or not the overpayment was made without fault on the part of the claimant infant or the representative payee and whether they were without fault in causing or creating the overpayment. An additional issue is whether recovery of the overpayment would defeat the purposes of Title 16 of the Social Security Act or be against equity in good conscience and of course the ultimate issue is whether

or not recovery of the overpayment may be waived under all the circumstances present in this case. Now Mr. Glancy, before we open this hearing did you have an opportunity to review and examine exhibits 1 thru 20 in the exhibit file?

ATTORNEY: Yes, sir.

ALJ: And do you have any objections to any of those exhibits?

BY ATTORNEY: No, sir.

ALJ: There being no objections, I'll receive exhibits 1 thru 20 in evidence and let the record show that Mr. Glancy has also submitted a current up to date financial report concerning the monthly expenses of the Exner family showing monthly income and monthly expenditures and that statement also contains additional statements with reference to checking accounts and other

assets if any owned by Mr. Exner or his family. Now Mr. Exner would you raised your right hand please?

(The claimant, Stanley Exner having been first duly sworn, testified as follows:

EXAMINATION BY ADMINISTRATIVE LAW JUDGE:

Q Will you state your full name please?

A Stanley Robert Exner.

Q Alright sir, and are you the father of Anthony Exner an infant?

A Yes, sir.

Q And how old is Anthony at the present time?

A He's eight years old sir.

Q And is he a disable (sic) child?



A Yes, he is sir.

Q. Cerebral Palsy, is that the problem that he has?

A Yes, sir. He has cerebral palsy and he also has epileptic seizures.

Q And has he has those conditions for a number of years?

A Yes sir, he had his first seizures, I believe when he was about fourteen, sixteen months old, less than two years old sir.

Q Alright sir, now the issue in this case is whether or not you were overpaid during the period from September 1979 thru December 1980 in the total amount of three thousand six hundred eighty-eight dollars (3,688.40) and forty cents. During that period of time were you the representative payee

for your son Anthony?

A I believe I was, yes sir
(INAUDIBLE)

Q In other words, were you the one that recieve (sic) the checks?

A I believe so sir as close as I can remember, yes.

Q Alright,--

A It was made out to me I believe, yes sir.

Q And was it made out to you Stanley R. Exner on behalf of Anthony Exner or words of substance to that effect?

A Yes, sir.

Q But in any rate, you recieved (sic) the checks and you knew that the checks were being sent to you for the use and benefit of your child Anthony Exner, is that correct?

A Yes, sir.

Q And were those checks used for that purpose?

A Yes, sir. Entirely.

Q Now according to the file an application was made on behalf of the infant back on June 7, 1979, and that particular instrument is marked exhibit 1 in the file and I'll show you exhibit 1 marked for identification which has been recieved (sic) in evidence, this is the application I'm referring to turning to the last page of that exhibit there appears to be a signature Anthony Earl Exner by Stanley R. Exner, now is that your signature?

A That is my signature, sir.

Q So that you were the one that actually made the application on behalf of your infant son I (sic) that correct?

A I signed the application yes sir.

Q Alright sir, that was according to the instrument itself that's dated June 7, 1979 and signed by you on the same date, is that correct to the best of your knowledge?

A Yes, sir.

Q Alright sir, and subsequently did you receive monthly checks from the United States Government that is Social Security checks.?

A I recieved (sic) checks yes sir, I don't know when the first I received but it was July or August somewhere in that area.

Q Alright and then did you continue to received (sic) monthly social security checks payable to you on

behalf of your infant son from September 1979 up thru December 1980?

A Yes, sir. I did.

Q And as you stated those checks was (sic) used for the use and benefit of your infant son is that correct?

A Yes, sir.

Q Now at the time you made out the application, exhibit 1 that I just showed you on June 7, 1979, at that time were you employed anywhere?

A No, sir. I don't believe I was.

Q Alright sir, to the best of your recollection, you were unemployed at the time you made out the application is that correct?

A At the time, yes, sir.

Q Was your wife working at that time on June 7, 1979?

A I believe she was working for her father, sir, Secretary or something, answering the phones.

Q That was Anthony's mother, you since have remarried, is that correct?

A Yes, sir.

Q Alright, And she was employed on June 7, 1979 by her father?

A Yes, sir.

Q Was she paid at that time?

A Yes, sir.

Q Do you recall what she was earning on June 7, 1979?

A Somewhere between \$550 . and \$600 . a (INAUDIBLE) somewhere in that area.

Q Alright, and subsequently did you yourself become employed?

A Yes, sir.

Q And you recall when it was that you became employed after June 7th of 1979?

A Yes, sir. Well, I went to work Civil Service August 6, 1979.

Q Alright, and when you went to work for Civil Service, was this the United States Government you were working for?

A Yes, sir.

Q And what kind of a job did you have?

A I went to work for the Family Housing Office in the Civil Service, the warehouse. I ran the warehouse for the Family Housing.

Q And at that time were you being paid?

A Yes, sir.

Q in August of 79?

A I started out making \$13,100 dollars a year, sir.

Q Now when you became employed for the U.S. Government in this job that you just mentioned did you advise the Social Security administration (sic) that you were employed?

A Well, sir I told the gentleman took the application from that I was interviewed and was assured of being working in the Civil Service on such and such a date when I did the application.

Q That's when you made the application (INAUDIBLE)?

A The application for the benefits yes sir (INAUDIBLE)

Q Alright, when you actually starting (sic) working did you advise the Social Security--

A Yes, sir.

Q Wait until I finished (sic) my question, Did you advise the Social Security Administration or any of its employees that you had obtained employment and was working for wages or salary?

A Yes, sir.

Q Did you subsequently, after August the 19th 1979 advise the Social Security Administration or any of its employees that you were employed?

A I advised them on or about October of 80, when I founded out that I had to.

Q That was October 1980?

A Somewhere in that neighbor, (sic) yes sir.

Q So is it a correct statement that you first advised the Social Security Administration that you were

actually employed sometime in October of 1980.

A Yes, sir. Directly, yes sir.

Q Alright sir, and you previously testified and is it your testimony now that when you filled out the application you told the employee of the Social (sic) Administration that you had applied for this Civil Service job and had been advised that you were going to be hired?

A Yes, sir.

Q Alright, now turning to Exhibit 6 page 2 this purports to be a statement of your earnings by one Rosemary W. Newton a payroll clerk it dated December 17th 1980, and it shows earnings by you for the years 1979 and 1980, its (sic) indicated on this statement of earnings that for the quarter covering July,

August and September of 1979 that you earned two thousand one hundred two dollars and eighty cents. (\$1,102.80) (sic) is that correct to be (sic) best of your knowledge?

A Yes, sir.

Q It is also indicated that for the quarter of October, November and December 1979 you earned three thousand eight hundred twelve dollars and eighty cents (\$3,812.80) is that figure correct to the best of your knowledge?

A Yes, sir.

Q And its (sic) indicated also for the first quarter of 1980 that you earned three thousand eight hundred fifty four dollars and forty cents (\$3,854.40) and that for the second quarter you earned three thousand eight hundred fifty four dollars and forty

cents (\$3,854.40) and that you had the same earnings of \$3,854.80 in the third quarter, and that you earned \$4,023.60 in the fourth quarter, now to the best of your knowledge are those figures correct?

A Yes, sir.

Q Now, are you familiar with what your wife's earnings were in 1979, her total earnings or don't you know?

A No. sir.

Q Alright sir, now your representative Mr. Clancy (sic) is submitted (sic) Exhibit 21 which purports to be your current financial statement of your family at the present time which include you and your wife that you're currently married to, do you have some other children besides Anthony Exner?

A I have one other one sir. A twelve year old daughter, yes sir.

Q And does Anthony Exner live with you or does he live with his mother?

A He lives with me sir.

Q He does live with you?

A Yes, sir.

Q In your present household you have the two children, Anthony is eight years old and how old is your child?

A She's twelve years old sir.

Q And twelve years old and then your wife and yourself, is that correct?

A Yes, sir.

Q Now, have you reviewed these figures there set forth on exhibit 21?

A Yes, sir.

Q And to the best of your knowledge are they true and correct and (sic) they appear on exhibit 21?

A Yes, sir (INAUDIBLE)

Q According to the totals you have \$1,620.02 in monthly expenses, and you have \$1,495 in income is that correct?

A That's correct, sir.

Q Alright now, its also indicated that you do not own any stock or bonds is that correct?

A That's correct, sir.

Q And in your checking account at the present time you have \$144.00?

A Yes, sir.

Q And then you have, there's a statement deposit of \$1,495.00 a month used to pay above bills, it (sic) that the deposit you make in the checking account each month? (INAUDIBLE)

A Yes, sir, we make, I make \$1,495.00 it all goes into the checking account and its all used to pay bills.

Q So you (sic) total take home pay is \$1,495.00 a month is that correct?

A Yes, sir.

Q And then in your saving (sic) account at the Marine Federal Credit Union you have \$5.00, do you have any other savings in any account in any banking institution whatsoever?

A No, sir.

Q And you own no stocks and bonds--

A Yes, sir.

Q Is that correct, (sic)

A That's correct sir.

Q Now is your complete indebtedness, the money that you owe on a monthly basis set forth on this instrument exhibit 21?

A Yes, sir, I (INAUDIBLE) so.

Q And does it start with house payment and then enumerated various medications until concludes with Andy's diapers \$25.00 a month?

A Yes, sir.

Q Now, you're employed and you earn \$1,495.00 a month net take home pay is that correct?

A That's correct sir.

Q You still work for the United States Government?

A Yes, sir I do.

Q And is your wife employed anywhere?

A No, she isn't sir.

A (sic) Do you know whether or not your first wife is employed anywhere?

A Yes, I do sir.



Q And where is she employed at the present time?

A She's the manager for First Financial Savings and Loan Jacksonville on Western Blvd.

Q Alright, do you have any information as to what her earnings are at the present time or don't you know?

A When she went to work their (sic) she told me that, I learned that she would make between \$18,000 and \$23,000 plus commission.

A Alright, sir, now let me ask you this, when you filled out that application dated June 7, 1979, at that time were you given any other information by the Social Security Administration with reference to he (sic) procedures in handling your son's

checks did they give you a booklet then of any kind?

A Not that I remember sir.

Q You don't recall?

A No, sir.

Q You say that you weren't given a booklet or that you don't recall?

A No, sir, I can't say that I wasn't I just don't recall sir.

Q You have no recollection one way or the other is that correct?

A No, sir, the only thing that I remember in that entire interview was me sitting one side of the table and him at the other and he filled out the application, I told him that I would be going to work for the Civil Service and he said that's okay and he said signed (sic) here and I signed there and signed for my son in that one place, that's the

only thing I can recall about that (INAUDIBLE) except I remember somewhere where he said that I would be receiving a package towards the end of the year or sometime in October for --

Q This was 79?

A When we did the application, yes sir. No sir, he said that I wouldn't receive it this year because it was so closed to the end of the year but I would the following year in October and its to update his file and to continuing the eligibility, sir.

Q And did you ever receive such a package?

A No, sir I didn't, I had contacted, well I had contact with Social Security and informed them that I was working. I wasn't hiding it sir. I didn't know, we went in early part of 80

to DEC sir the Developmental Evaluation Center here in New Bern and I have paper sir where we were referred to them by the SSI and it says here that I was employed by the Civil Service. Sir, I wasn't trying to hid (sic) it I didn't know.

Q Alright, well I assume Mr. Clancy (sic), (INAUDIBLE) we'll put that document in evidence (INAUDIBLE)

Q Now, it shows in Exhibit 16, this is a paper that bears the title Supplemental Security Income Payment Decision, it bears the date of August, 8 1979 --

A Yes sir.

Q and its (sic) addressed to you Stanley Exner for Anthony E. Exner at 2000 Oakwood Drive, Jacksonville, N.C.

Is that where you were living at that time?

A Yes, sir.

Q And you recall getting this document?

A No, sir.

Q You have no recollection at all one way or the other?

A I've seen the document, yes sir and the papers, but I don't recall when I received it, no sir.

Q You recall receiving the document?

A No, sir I don't recall receiving the document.

Q Do you say that you did not receive the document, or that you don't recall having receive (sic) the document?

A No, sir, I don't recall seeing or receiving the document. I would not say that I had not receive (sic) it. I did receive it, I found it in some papers in my house when my wife and I divorce (sic). We found that document, I did not receive the mail sir, my ex-wife receive (sic) the mail and she took care of our financial (INAUDIBLE)

Q But the document was among your household papers?

A I did find it in important papers in the household I found that document.

Q When were you divorce (sic) from your wife, just the year that's all I'm interested in?

A 1983.

Q Alright,

A We separated in 1983, sir.

Q Alright, now on this document down in the second paragraph from the bottom on page 4 exhibit 16 the sentence appears, for example, you should tell us if he moves or anyone else moves from or into his household, if his martial (sic) status changes, if income or resources for him or members of his household change. Do (sic) ever recall reading that sentence at any time prior to the time that you found this document among your household papers?

A No, sir I don't recall.

Q You have no recollection one way or the other?

A Not reading it prior to me finding it when we filed for the waiver on it and I found that piece of paper I read it at that time that was the first time I read it sir.

Q Do you remember getting a decision from the Social Security Administration (sic) setting forth the details with reference to the amount that your son was to be paid as a result of the application that you filed?

A I'm sorry sir, the change in the amounts, no sir.

Q Well did you, do you remember receiving a decision in writing from the Social Security Administration advising you that your son was to be paid Social Security payments?

A No, sir.

Q You don't have any recollection of --

A I don't recall sir

Q of receiving any notice?

A Yes, sir.

Q And when you got the, do you recall receiving (sic) first check?

A I don't recall, I know we did sir but I don't recall (INAUDIBLE)

Q You have no recollection of the events surrounding the receipt of the first check?

A No, sir.

Q You don't recall whether there were any papers enclosed with the first check or not, is that correct?

A I don't recall seeing the first check, I recall after receiving it, no sir.

Q Alright, sir. Now at anytime between the time you filed your application on June 7th of 1979 up until the time that you were advised that there was an overpayment sometime in 1981, at any time during that period of

time did you have any communications with the Social Security Administration with reference to the checks which you were receiving on behalf of your son?

A I believe so, yes sir.

Q And what communications did you have?

A Telephone communications, I know that every time I had any contact with them I call, talk to one of them either sometime in 1980 and that' (sic) when I found out that I had overpaid and I told them I wasn't aware and --

Q How did you find out that you were overpaid?

A I think we got a letter in sir, that requested us to call, a note in requested us to call concerning the amount of payments or concerning the payments or something, and I call

them. When I get, every time I got a call or anything from them I call them.

Q They sent you a letter on January 19, 1981, I say its a letter, its actually a printed form called Supplemental Security Income Notice of Overpayment, its Exhibit 9 in the file and in that letter dated January 19th 1981, you were formally advised that you had been overpaid. Did you receive some notification of before January 19, 1981, that you had been overpaid?

A As I said sir, it was either in October somewhere in that area of 80 that I did talk to them on the phone and I was, and I told them I was working and stuff and they said that, well you don't rate SSI and they stopped it at that time. When they stop (sic) it, that's when I, you know, it was sometime around

October of (sic) so, whenever I talked to them sir, I don't recall when it was.

Q What I'm trying to ascertain is, if when you talked to them was it as a result of a communication from them to you, or was it a communication that you initiated?

A I believe they sent a note to get in touch with them and I called them at the New Bern office.

Q Did the note indicate why they wanted you to get in touch with them?

A I don't recall sir.

Q You have no recollection one (INAUDIBLE) or the other?

A No, sir.

Q Alright, sir. Mr. Clancy (sic).

EXAMINATION BY ATTORNEY:

Q I just want to get a few background questions, (INAUDIBLE) have you been in the military service yourself?

A I spent six years military duty sir, two years Naval Reserve and four years in the Marine Corp.

Q What years were you in the Marine Corp?

A 1964-1968.

Q Combat duty? (INAUDIBLE)

A Yes, sir one tour in Vietnam and with the Tank Battalion, Vietnam, (Phonetic)

Q And, at the time of this overpayment what was your wife, was she later employed or was she employed about that time after she left the employed (sic) of her father, I think?

A Shortly, after he went to work for the Credit Union.

(At this point ALJ: indicated that the cassette had to be turned over and they were off the record)

(Back on the record)

Q So she took a job, where?

A Marine Federal Credit Union.

Q And when did she do that?

A Sometime in 80 or 81 sometime around that area.

Q And your wife took a job in what capacity?

A As a mortgage processor, handling the mortgage.

Q Was that her training then in Banking?

A Well, when I met her she had just, she had been working for, before we got married she was working for the

Bank in North Carolina, and was a teller there and then she worked in mortgage companies in California and as a mortgage processor in (INAUDIBLE) yes sir, it was primarily her training.

Q Who handled the financial matters, payment of bills and that sort of thing in your household at that time?

A She did sir, my ex-wife did.

Q Is there any particular reason why she handled them, not you?

A Well, yes sir, there were times when she wasn't working and she would be at home in order to handled (sic) it and she had the availibility (sic) of the computer, the calculators and stuff that she used where she was working and I was working and I was bring (sic) home my time in at work and she would take the bills and stuff and she'd be home when



the mail came and she would take care of.

Q Was that the case thru out (sic) your marriage pretty much?

A Yes, sir.

Q At the time of Anthony's birth and prior to your application did you incur any additional expenses related to Andy, son Anthony?

A Yes, sir. I have no insurance and his hospital expenses were quite heavy at that time, and his medical expenses, just the birth of Andy cost about \$8500.00 or something in that neighborhood, because he had to remain in the hospital so long. He had (Phonetic) membrane disease and was premature and had to stay in the infant care up in (INAUDIBLE) Memorial Hospital

and he was there for three weeks, I believe and it was pretty expensive.

Q How did you pay for that?

A I, it went into collections at the time and until I got a nouse, and I finally ended up, I had to refinance my house and I had to pay the medical expenses from equity in my house.

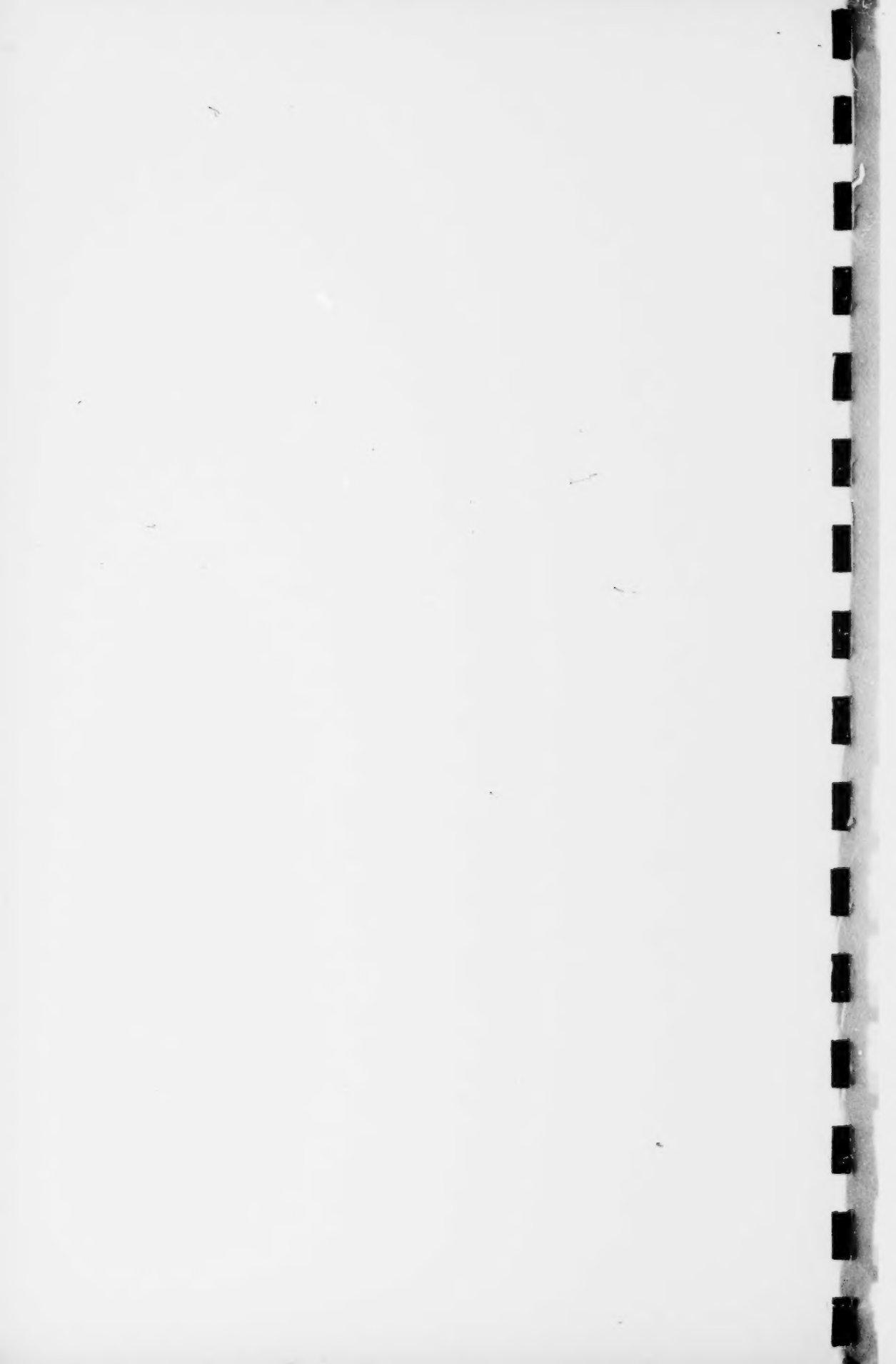
Q Had (sic) you had to refinance your house again?

A We've refinanced it four times sir.

Q Is that part of your monthly expenses now reflected in exhibit 21?

A Yes, sir. I owed right now somewhere around \$27,000 on my second trust deed sir.

Q How did you find out about SSI, do you recall?



A I didn't find out about it sir, except for my wife, my ex-wife, excuse me. My ex-wife called me one day and told me or told me and I don't recall when that she had talked to someone from the Developmental Center or some place and they said that we could be eligible for Supplemental Income because my son had Cerebral Palsy and she took care of it. I didn't have anything to do with the filing of it the obtaining the information (INAUDIBLE) sir she was handling the financial situation and she took care of it.

Q But you have stated that you were the person who actually applied for it with the man from the New Bern Social Security office?

A My wife and I, my ex-wife and I were sitting, Mr. (INAUDIBLE) I believe

it was sitting there, he asks the questions, we answered and I signed the application, that's the only thing that I can remember.

Q And at that time, you already indicated to the judge, that you knew that they (sic) was good chance you would be employed with the Civil Service?

A Yes sir. I told them at that time.

Q Did you know at that time approximately how much you would be making?

A Yes, sir, that was explained at the interview.

Q Did you tell Mr. (Phonetic) at that time that you expected to make whatever?

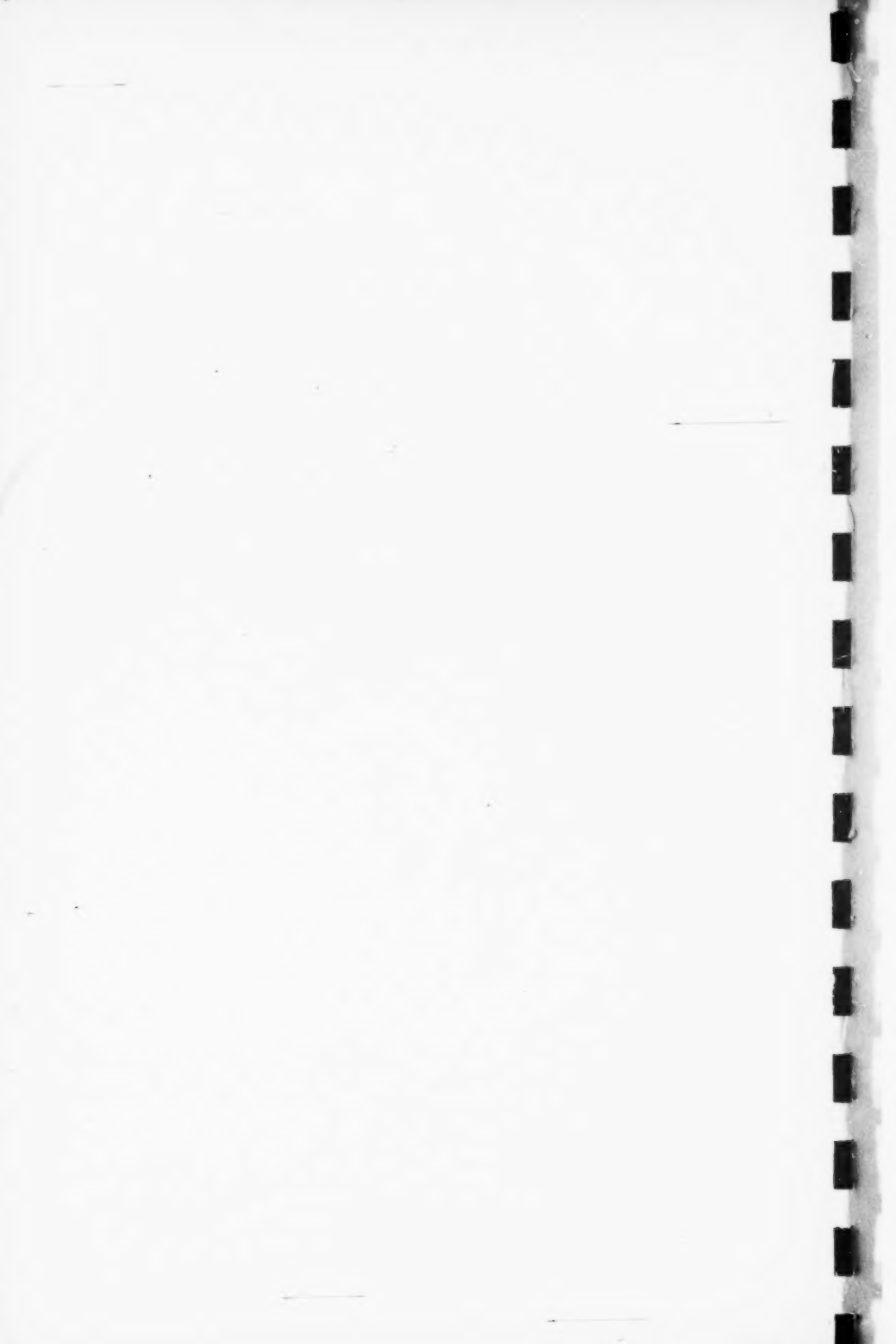
A I told him that I would be starting in approximately a month making \$13,100.00 a year to start.

Q And how did he respond to that do you remember?

A The only thing I can remember is (INAUDIBLE) well, that's okay and kept on writing and asking additional questions, he just said well that's okay, seem to push it aside and say well that's alright.

Q Did he talk to you about the reporting requirements later, I mean, what you would have to report later on down in the year or so?

A The only thing I can remember was him saying that you wouldn't received (sic) anything this year but you would received (sic) a package at the end of the year and at the time,



because I was familiar with government, he said the end of the government year was around in October or something like that and we'd receive a package around the end of that year and we were to fill it out and send it back and they'd updates (sic) our file, and see if we are still eligible and we'd get one once a year. And he said we wouldn't receive one that year because its almost the end of the year.

Q What did you feel the SSI check was for?

A It's for Andy. It's to help us with his medical bills and expenses.

Q Did you make any connection between what you and your wife earned and that check, how it might effect the check?

A No. I, No, none at all because, I was told as far, as I was told it was just on Andy because he had CP, Cerebral Palsy, that's the only reason we were receiving (sic) it.
(INAUDIBLE)

C E R T I F I C A T I O N

I have read the foregoing and hereby certify that it is a true and complete transcription of the testimony recorded at the hearing held in the above case before Administrative Law Judge John F. Rafferty.

/s/ Bernice Cook

Transcriber - Bernice Cook

Science & Management Resources,
Inc.

Contractor #220-90-0407

Q And you got that information through what source?



A Max White. Through --
according to her, the person down at
Social Services that she talked to.

Q And all this money that you
received, the overpayment amounting to
about \$3,600.00, has it been used for
Andy's medical expenses?

A That and more sir. That and
more.

Q After you started getting SSI
did he continue to incure (sic) medical
expenses?

A Yes sir. Yes sir.

Q In what form?

A He was in the hospital several
times, we had to pay \$70.00 a month for
the developmental center schooling, then
he had to go to a special school down at
Camp LaJeune (sic), Onslow County
Developmental Center and we paid \$70.00

a month for that, we had medications that at times was as much as \$60.00 a month until it was changed and now it's running about \$30.00 a month. We had trans -- taken him to Duke Medical Center in 1980, he spent 8 weeks in Duke and the bill was over -- just the hospital portion was \$27,000.00, and...

Q Did you -- would you tell us what you had to do during that time when he was in Duke University Hospital?

A Well, my wife stayed up there as much as she could and -- with him as much as she could until she had to get away and she would stay in a motel when a -- because of what -- the facilities weren't that great there and he was in intensive care sometimes. She would sleep in the lobby or go to a motel, we'd have that, I would -- I didn't have

any leave, I'd lost all my leave, I'd just started work so I had no leave or anything so what I would do is I would go up -- come to work Monday and Tuesday and Wednesday and leave at 4:30 when I got off work Wednesday and drive up to Durham to Duke Medical Center and spell (Phonetic) my wife so she could go out a little bit and I would stay with Andy until Wednesday night and come home and go back to work Thursday morning, and work Thursday and Friday and go back up Friday night and stay for the week-end and come back Sunday, and repeat it for 8 weeks, and when I was there it was either -- my ex-wife or I would have to stay in a motel and I had a child down here that sometimes she would stay here and sometimes she would go with us, but

we would have to have a motel room or something of that...

Q I don't know, you may have stated this already, but did you feel you could trust your wife with the finances that manages things?

A Yes sir she has -- that was her business, she worked in bookkeeping (sic) for her dad and the mortgage company business.

Q Did you learn later that perhaps that trust was misplaced?

A Yes sir I found out that my ex-wife had borrowed \$1,000.00 off of her father to pay for house payments that I didn't know was in arrears and she went on the sly to him and borrowed \$1,000.00 to pay it.

Q And that was necessary for what reason?

A I don't know sir, I really to this day don't know where it went.

Q Do you know if any -- other indication whether she misplaced or mis-spent other of your monies?

A I had sat down and worked out a budget and we always came short, I don't know where it went, I just don't know, but she spent -- she always had new clothes and went out to eat a lot and we used a lot of money up but I had budgeted and I sat down and everything was covered, everything was paid for and her father was the one that told me that she had borrowed \$1,000.00 off of him to pay back payments and to this day I can't figure out what happened to the money, what she did with it I just don't know.



Q Were these -- was this period of time emotionally trying for you?

A Yes sir, we -- of course at this time I had just learned that my son had CP which was pretty rough, pretty hard to understand and then on top of that we were having financial problems and on top of that we were having marital problems when she -- subsequently and it ended up in a divorce but, you know it just a, it was a bad time. That's why -- even at the interview, I'm not that familiar with it other than a few things because I had just learned not a few months before that that my son had CP and I don't recall that much about the interview, I was more concerned with him, what was going on.

BY ADMINISTRATIVE LAW JUDGE:

Q What interview are you referring to sir?

A The interview with the SSI people down at...

Q You mean at the Social Security Office?

A At the courthouse in Jacksonville, yes sir.

Q At the time you filled out the application?

A Yes sir, I had just learned about two or three months prior to the time we filled out the application that my son had CP, had Cerebral Palsy and was going to be mentally retarded for the rest of his life.

Q Was your first wife named Edna?

A Yes.

Q Was she employed at that time?

A Yes sir. .

Q And had she been employed some time before June 7th, 1979?

A Yes sir, she worked as a bookkeeper (sic) for her father, and she had worked prior to that as a mortgage company representative in California as a loan processor and she worked prior to that at a bank.

Q So that she had independent income, independent of whatever you were earning, right?

A Yes, sir.

Q You were not employed in June of '79 I understand then.

A Yes, sir.

Q Had you been employed before June of '79?

A Yes sir, I was self-employed, I had a real estate office in -- I opened

up in -- I had my own office in -- as you recall...

Q You were in real estate sales?

A Yes, sir.

Q Were you a broker?

A Yes, sir.

Q How many years had you been in the real estate business?

A I went in real estate business in 1974 in California and when we moved here in '76 I went to work for a real estate organization as a salesman down in Jacksonville and then I -- a year later went and got my broker's license and worked as a broker for s (sic) short period of time, then opened my own business up in '78, somewhere (sic) in that area, and that's when the real estate market went to 17 and a half percent interest and nobody was buying

homes and I was just -- I was -- that's why -- one of the reasons -- that's one reason that my wife was doing the book work and the finances at home is because I worked as much as I could because I was trying to keep the office going, and I just -- I didn't have the time, she was handling it.

Q Alright, and how much education have you had Mr. Exner?

A I'm a high school graduate.

Q You're a high school graduate?

A I'm a high school graduate sir and I've gone to a community college in California..

Q You don't have a...?

A I don't have the degree...

Q ...(INAUDIBLE) Degree?

A ...no sir, no sir.

Q How many hours or (sic) college training have you had?

A I -- probably a year and a half sir, various courses. Mostly real estate and business.

ALJ: Alright sir. Go ahead Mr. Glancy.

BY ATTORNEY:

Q When you started getting -- when you got the phone call in October when -- in 1980, did you discuss this with your wife, do you recall?

A Do I don't sir.

Q Was there any discussion that you can recall between you and your wife regarding SSI or reporting whether she was going to take care of it?

A I got -- well yes, she was supposed -- I had called her -- after we got this thing I had called them up and

I said -- and we were trying to get it straightened out and I talked to the lady and I says well send me the paperwork to file for a waiver and when it came in my ex-wife got it and was supposed to have filed it and sent it in, and I know I had talled (sic) to Mrs. Arnold many times, I -- many times and she asked one time you know, what had happened, I says well my ex-wife, my wife at the time, had sent it in, we are applying for it, and I was under the impression that it was sent in and didn't learn otherwise until after we had separated and I found the application for the waiver of overpayment with her signature on it in the same papers that I found that slip in sir.



Q Now there's some communication -- some report of contacts in the record as well in Exhibit 12 and 11, I don't know if you've ever seen those, regarding statements you made to Social Security about repaying and there's also -- one of these statements indicates that the lady at -- some lady at Social Services indicated that she had never talked or said something regarding actual eligibility requirments (sic) for SSI, do you of any -- recall making these statements marked 2281 from Mrs. Arn -- I guess it's Mrs. Arnold?

A I don't recall those words no, but I would not deny saying something to that effect that there's possibly no -- there's no way that I could pay it.

Q Do you know a Linda Byrd person, I guess a DSS in Jacksonville is



referred to in that statement?

A I don't know her, I have never talked to her, no sir. My ex-wife said that -- give me that name saying that that was the person that she had talked to and the Social Services down there or someplace down in Jacksonville saying that we rated that on our own and told us to apply for it and stuff.

Q When you were called upin (sic) to do so did you cooperate with the Social Security people as best you could?

A I thought I did sir. I I -- everytime there was a call for Social Security I caled (sic) them, everytime they wanted -- they wanted a statement of earnings, I sent it to them, I had no way at any time, not once did I ever deny working or not give them the



information that they wanted, not once, and not once did I call. I -- Mrs. Arnold said that I -- she had problems getting up with me. If she called during the early part of '80 I wouldn't deny it because I was very seldom there, I was in Duke all the time with my son and he was in the hospital and I could have cared less about her calling as long as my son was in the hospital.

Q Have you ever concealed the amount you've had from Social Security?

A No sir. No sir.

BY ATTORNEY: Okay and thank you.

ALJ: Mr. Glancy this is Exhibit 22, did you wish to offer that into evidence?

ATTORNEY: Yes sir, it will be useful to further document the problems



that Andy's had and the expenses they've had to incur.

ALJ: Alright sir I will receive Exhibit 22 in evidence at this time. Do you have any further documentary evidence of any kind?

ATTORNEY: I have no further -- we have no further documentary evidence.

ALJ: Do you have any further testimony to offer at this time?

ATTORNEY: No futher (sic) testimony at this time.

ALJ: Alright do you wish to submit a memory entim (Phonetic) in this case?

ATTORNEY: I wish to make a few pre-closing arguments or closing statements if you...

ALJ: Alright, go right ahead.

ATTORNEY: As you've already noted previously that there's a dual cirteria



(sic) here for determining whether Mr. Exner will indeed have to repay the amount of money in question. First question is whether he was at fault and that part of the criteria comes under 416552 (sic) of the SSI Regulations (sic). The key question there as found in that regulation is whether he furnished the Social Security Administration with information regarding his income and financial situation. We've already heard that Mr. Exner has cooperated with the Social Security people at the time of his application to the best of his ability, heard that in his testimony, and that he in fact told a person, upon whom he felt he could rely as being knowledgeable (sic) of Social Security Regulation Requirements, that he expected to earn

\$13,000.00 or whatever in his new job which he hoped to begin approximately a month after the application was taken, and that that individual told him that -- works to the effect that well, that's okay, and that he would hear from the Social Security Administration within a year after that application and be told at that time to report again his income and what other information they felt was necessary, so he -- relying on that information, and believing, as he's told us that that check was for Andy and Andy only, his medical expenses and that his income really had no bearing, his -- he went on and received the checks in good faith feeling that he was entitled -- his son was entitled to them and that he would spend that money for his son's considerable medical expenses. So

considerable that the SSI check didn't even begin to cover them, he has refinanced his house, as he's told us, four times now to meet those expenses. So at no time has he attempted to conceal information and when he found out later in 1980 that there may be some question, he attempted to the best of his ability given his emotional state, the fact that his -- he was in a financial crisis, the fact that he is relying to some extent on his wife who maybe (sic) -- that his reliance was misplaced there and he's worried about his son as well, he's emotionally distraught by his son's condition. He attempted to continue to cooperate with (sic) them and provide whatever information they wanted. He learned later that his wife had apparently had

not provided the information he thought she had provided, but he did, he attempted to, he's tried, and he has not tried to conceal any information. His understanding was, as I said that, his income had little or no bearing, and he told them what the income was. Given those facts, given that situation, given his state of health and state of mind and the degree of information and the amount of understanding he had I think circumstances establish that he was without fault, he didn't understand fully the requirements there, or they weren't fully explained to him. I think for that reason without thought (sic) should be found here. And then the second question whether recovery would be against equity and good conscience under 416533, I think that goes without



saying almost given Exhibit 21 and the Financial Statement of the Exner family, they are still paying hospital bills incurred through Andy's illness to the extent that they are in the hold every month approximately \$125.00 in it, as I've said, they've had to refinance their home four times to meet the expenses so that there's no question that it would be agianst (sic), in my opinion there's no question that it would be against equity and good conscience to recover this money. Both parts in our opinion have been met without fault and against equity and good conscience we respectfully ask that this overpayment be waived.

ALJ: Alright sir. What I'm going to do in this case is I will review all of the evidence including the testimony



today and then I will again review the regulations with reference to overpayments, waiver of recovery under the Supplemental Security Income sections that are applicable to this case, as well as the reugulations (sic) and then I'll make a decision in writing as to whether or not waiver of recovery should be granted in this case. Now when I make my decision as I've said it will be in writing and a copy will be sent to you sir, and a copy will be sent to Mr. Glancy. If when you get my decision you have any question at all concerning it, you should consult with Mr. Glancy and seek his advices (sic) in the matter. Now just let me ask you one other question.

BY ADMINISTRATIVE LAW JUDGE:

Q During this period of time that your son was receiving these SSI checks, wasn't he covered under Medicaid?

A I don't know sir I made not have applied for Medicad (sic).

Q You never made an application for Medicaid at any time?

A No sir.

Q Alright.

A I never applied for unemployment insurance when I was eligible. I figure I can make it on myself. I just never had it. I didn't apply for unemployment insurance when I went out of the servcice (sic), and when I wasn't working, I moved and went to work somewhere else, but, it wasn't for me sir.

Q Oh no but I was just curious (sic) as to why you didn't seek to get some medical assistance for your son who obviously was a disabled child.

A I don't know sir, I didn't -- I wasn't aware of the -- that he was eligible. Nobody made me aware of him being eligible for it.

ALJ: Alright sir, well thank you very much, and if there's (sic) no further evidence (sic) or testimony why, Mr. Glancy, then we'll close this hearing.

ATTORNEY: Yes sir.

ALJ: Thank you folks for coming in, take care of yourselves, both of you.

(There being nothing further, the record was thereafter closed.)

C E R T I F I C A T I O N

I have read the foregoing and hereby certify that it is a true and complete transcription of the testimony recorded at the hearing held in the above case before Administrative Law Judge John F. Rafferty.

/s/ Sandra Galloway

Transcriber - Sandra Galloway

Science & Management Resources,

Inc.

Contractor #M190 19/ 1

APPLICATION FOR SUPPLEMENTAL SECURITY

INCOME (INDIVIDUAL)

This application is to be completed by an individual who is either single, widowed, divorced, or who has a spouse but the spouse's income will not be considered in determining the individual's eligibility for payments. The information obtained on this form is used to develop and decide if an individual applying for benefits is eligible. No supplemental security income or State supplement, if applicable, may be paid unless a completed application form has been received (42 U.S.C. 1383(e); 20 C.F.R. 5416.300). The routine uses for the information obtained are fully explained and published annually in the Federal Register. The Social Security

Administration will further explain these uses upon request.

I hereby apply for supplemental security income under title XVI of the Social Security Act, for benefits under the other programs administered by the Social Security Administration and, where applicable, for medical assistance under title XIX of the Social Security Act.

1. Print your name (first, middle, initial, last): ANTHONY EARL EXNER

Sex: x M F

Date of Birth: 09/16/77

Social Security Number: applied

Print other names and SSN's you have used: --

(a) Check whether you are:

x Single;

 Widowed;

☐ Divorced;

☐ Living in a separate household
from your spouse

If single, widowed, or divorced go
on to item 2; otherwise, complete
(b) through (e)

(b) when did you and your spouse
begin living in separate
households? Date:

(c) To the best of your knowledge,
is your spouse --

(Check one or more)

☐ Age 65 or older?

☐ Blind? ☐ Disabled?

☐ None of these

(d) Print spouse's name

Print maiden name of wife

Social Security Number

(e) Print spouse's address

2. (a) Are you blind or disabled?

(If "No", go to item 3.)

☒ YES ☐ NO

(b) If you are under age 22, are you regularly attending school now or do you expect to attend school in the next 4 months?

☐ YES ☒ NO

3. Where were you born? _____

Show state or foreign country: NC

4. Was a public or religious record of your birth made before your fifth birthday? ☒ YES ☐ NO

5. Are you a United States citizen?

(If "Yes," go to item 8.)

☒ YES ☐ NO

6. If not a citizen, are you lawfully admitted for permanent residence in the United States? ☐ YES ☐ NO

7. How long have you made you your home
in the United States? (ILLEGIBLE)

8. Have you been outside the United
States in the last 30 days?

☐ YES ☒ NO

Date left _____ Date returned _____

9. Have you ever filed for Supplemental
Security Income before?

☐ YES ☒ NO

10. Do you or any children in your
household have Medicare or other
health insurance or medical coverage
from the Veterans Administration,
Workmen's Compensation, accident
insurance or any other source?

☐ YES ☐ NO

11. Do you have any unpaid medical
expenses for this month or the
previous 3 calendar months?

☐ YES ☐ NO

12. Have you filed for or are you now receiving public assistance?

 YES x NO

(If "Yes," show:)

Name and address of agency --

Case Number --

Amount of payment per month and date of last payment --

13. Have you (or your spouse) ever filed an application with the Social Security Administration for retirement, survivor, disability, or Medicare Benefits? YES x NO

(If "Yes" give:)

On whose Social Security record --

Social Security claim number --

Amount of payment per month and date of last payment

14. Have you (or your spouse or a former spouse, if any) ever:

a. been in military service?

 YES x NO

b. worked in the railroad
industry?

 YES x NO

c. worked for a Federal, State,
county, or city government?

 YES x NO

d. worked for a private employer
with a pension plan?

 YES x NO

e. belonged to a trade union with
a pension plan?

 YES x NO

If "Yes," give:

Name of person Dates (from)

To Organization

15. Have you received this month or do
you expect to receive in the next 14
months any of the following? (Do

not include any social security or assistance payments listed in items 12 and 13.)

- a. wages ☐ YES ☒ NO
- b. self employment earnings
 ☐ YES ☒ NO .
- c. pensions, annuities, or
 unemployment, workmen's
 compensation, VA, RRB, Civil
 Service, or Black Lung
 benefits ☐ YES ☒ NO
- d. rents, dividends, interest,
 royalties ☐ YES ☒ NO
- e. support or contributions from
 any person or organization
 ☒ YES ☐ NO
- f. Other income (specify) _____
 ☐ YES ☒ NO

16. Check and complete the section below
 which best describes your living

arrangements

You live in a

☒ house ☐ apartment

☐ mobile home ☐ room

Other (specify) _____

(If you have checked one of the
above, complete (a) or (b) below)

OR

You live in a

☐ rest or retirement home

☐ hospital ☐ nursing home

☐ school ☐ rehabilitation center

☐ other institution

(If you have checked one of the
above, complete (c) below)

a. ☐ Which you own, are buying,
 or rent

Amount of monthly mortgage or
rental payment _____

Estimated current market value
of home you own or are
buying _____

Does anyone else pay part or
all of your mortgage, real
estate taxes, rent, or
utilities? YES NO

- b. x Which someone else owns or
is buying or rent

Their Name is Stanley Exner

Their relationship to you is
father

They furnish food x YES NO

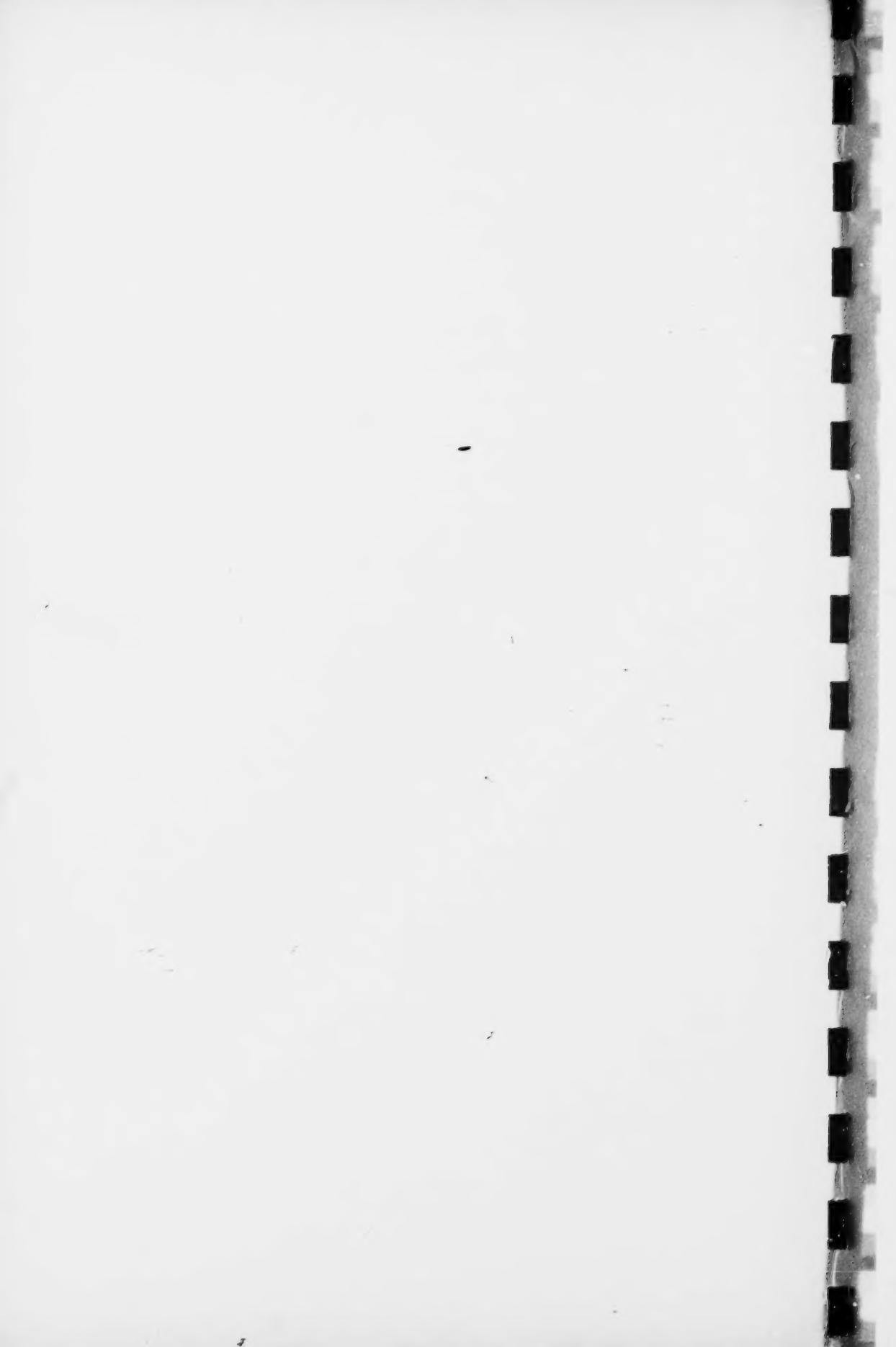
- c. Name and Address of Institution
Date of Admission

17. Are there any other persons living
in the same household as you?

 x YES NO

(If "Yes," please give:)

Name: Stanley Exner



Relationship: father

Date of Birth: 7/14/45

Blind: -- Disabled: --

If under 21: Student Married

Name: Edna Exner

Relationship: mother

Date of Birth: 1/11/47

Blind: -- Disabled: --

If under 21: Student Married

Name: Kathryn Exner

Relationship: sister

Date of Birth: 5/1/73

Blind: -- Disabled: --

If under 21: Student yes

Married no

18. Do you own any motor vehicles?

 YES x NO

(If "yes," complete the following:)

Year

Make & Model

How is the vehicle used?

19. Do you own life insurance policies with face values totaling more than \$1500 per person?

 YES x NO

20. How much cash do you have on hand?

\$ 0

21. Do you either individually or jointly with anyone else, have checking or savings accounts of any kind, savings certificates, money in safe deposit boxes, stocks, bonds, notes or other negotiable items?

YES x NO

22. Do you have any household or personal item valued at more than \$500?

 YES x NO

23. Do you have any other money or property of any kind? (Such as houses, mobile homes, other

buildings, land, equipment,
business, or any other item not
considered elsewhere on this
application.) ☐ YES ☒ NO

24. Have you sold any property, or given
money or property to any person in
the last 12 months? ☐ YES ☒ NO

YOUR RESPONSIBILITIES

If this application or other
information shows that you may be
eligible for any payments or benefits
from other sources, you are required to
file for them when notified by the
Social Security Administration.

You must notify the Social Security
Administration immediately if there is a
change in your address, living
arrangements, family size or
composition, income, resources, or if

you leave the United States (50 States and District of Columbia) and will be absent for 30 consecutive days.

If you are applying as a blind or disabled individual you must agree to report any improvement in your medical condition, return to work, or discharge from the hospital, if you are now hospitalized. It is also necessary to accept available Vocational Rehabilitation services if a review of your disability or blindness by your State rehabilitation agency indicates that you may benefit from such services.

Do you accept these responsibilities and agree to notify the Social Security Administration immediately if any of the above events occur? x .YES NO

YOUR AUTHORIZATION

Do you give your permission for the Social Security Administration to check any statement you make on, or in connection with, this application and to ask your employers for information about your wages? x YES NO

Do you authorize any and all sources of information (including any physician, hospital, agency or other organization) to disclose to the Social Security Administration or to the State agency that may review this application or your continuing disability or blindness (if disability or blindness is the basis of your application), any medical records or other information about you or your condition?

 x YES NO

Remarks (You may use this space for any explanations. If you need more space attach a separate sheet.)

Kathryn has no income.

I know that anyone who knowingly and willfully makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal or State law or both. I affirm that all information I have given, in this document and elsewhere, is true.

SIGNATURES

Applicant's Signature (First name, middle initial, last name):

Anthony Earl Exner by Stanley R. Exner

Mailing Address (Number and street, apt. no., P.O. Box, or Rural Route):

2000 Oakwood Dr

City and State: Jacksonville NC

Zip Code 28540

Date (Month, day, year): 6/7/79

Telephone number(s) at which you may be
contacted during the day:

455-0729 wife 455-9830

Enter name of county (if any), in which
you live: Onslow

NOTE: If residence address is different
from mailing address show it in
"Remarks."

Your application does not
ordinarily have to be witnessed. If,
however, you have signed by mark (X),
two witnesses to the signing who know
you must sign below, giving their full
addresses.

1. Signature of Witness

Address (Number and street, City,



State, and Zip Code

2. Signature of Witness

Address (Number and street, City,
State, and Zip Code

NOTE: If you are filing this application on behalf of another person, please print below, your full name, followed by your title or relationship to the claimant (for example, "John J. Jones, Son").

Name (First, middle initial, last)

Title or Relationship

STATEMENT OF INCOME AND RESOURCES

Claimant who is eligible individual:

Anthony Earl Exner

Social Security No.: applied

This statement asks for detailed information about income and resources needed to decide if an individual can receive Supplemental Security Income. If this statement is made by OR with respect to an individual filing for or receiving benefits, no benefits or further benefits can be paid under this program unless this form is completed and filed as required by existing law and regulations (42 U.S.C. 1383(e); 20 C.F.R. 416.300 and 416.705). If this statement is made by AND with respect to an individual who is not filing for or receiving benefits but whose income or income and resources affects the

eligibility of another individual for benefits, this statement is authorized by law, (42 U.S.C. 1382c(f) and 1383(e); 20 C.F.R. 416.300 or 416.705). While you are not required to respond, your cooperation is needed to make the determination of eligibility of another individual accurate and timely. The routine uses for the information obtained are fully explained and published annually in the Federal Register. The Social Security Administration will further explain these uses upon request.

PERSONS REPORTING INCOME

AND/OR RESOURCES

(A) Name (First, Middle Initial, Last):

Stanley Exner

Check which: ☐ Claimant ☐ Child

☒ Parent ☐ Essential Person

Social Security No.: 283-40-5385

(B) Name (First, Middle Initial, Last):

Edna Exner

Check which - Spouse of:

 Claimant X Parent

Social Security No.: 243-76-8483

When there is an (A) column and a (B) column in the following sections, check or use the (A) column to show it is information about the person named in (A). Check or use the (B) column to show information for the person named in (B).

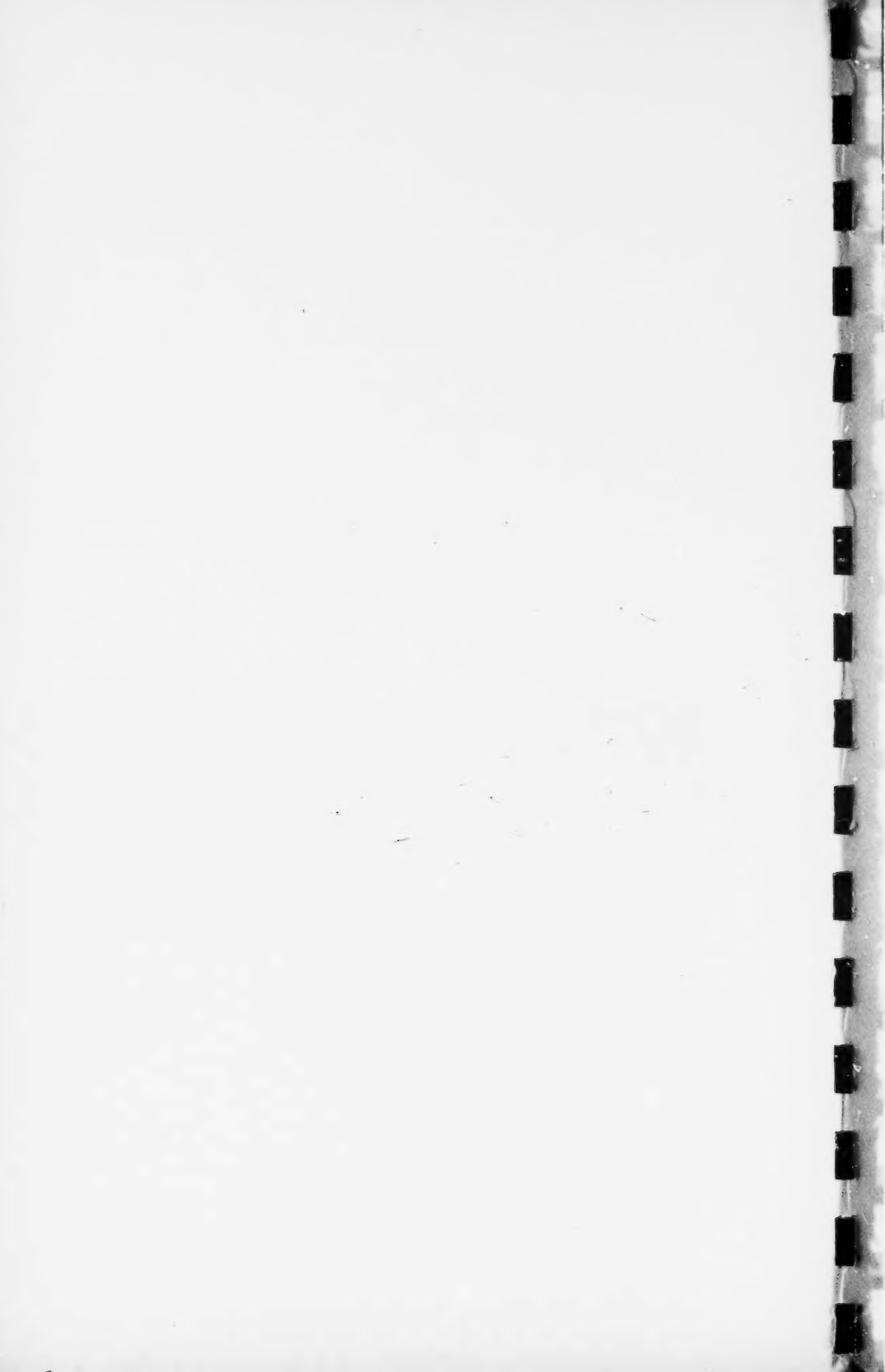
1. **Wages**

(A) Are you an employee?

 Yes X No

(B) Are you an employee?

 X Yes No



If yes, estimate expected gross wages for month of the calendar quarter of filing the application and for each of the four quarters after that quarter. (Gross wages are the amount before an employer deducts taxes, insurance premiums, etc.)

QUARTER OF FILING OR EFFECTIVE FILING

	(A)	(B)
Month		
First month		
of quarter:	_____	_____
Second month		
of quarter:	<u>5/79</u> _____	<u>\$ 500</u>
Third month		
of quarter:	<u>6/79</u> _____	<u>\$ 625</u>

If claim filed in the first month, show

TOTAL \$ \$

OTHER QUARTERS:

9/79 \$1625

12/79 \$1625

3/80 \$1625

6/80 \$1625

NAME AND ADDRESS OF EMPLOYER(S)

(A)

(B) W. E. Baysden

Rt 2

Richlands, NC

2. **Self-employment:** Are you self-employed (last year, this year, or next year)? YES x NO

(a) Type of business

(b) Last year's gross income

(c) Last year's net income (or loss)



- (d) This year's expected gross income
- (e) This year's expected net income (or loss)
- (f) Use items 4-12 of this form to itemize the total assets of your business (for example land, buildings, equipment and cash) and show their current market value and amounts owed)

UNEARNED INCOME

3. **Unearned income:** Do you receive or expect to receive any income other than wages or self-employment income? ☐ YES ☒ NO

If yes, complete the line or lines which describe the income. However, if both (A) and (B) have the same type of income, use the line to describe that



income for (A) and use line marked
 "Other" to describe that income for (B)

Type	How Often Beginning*	Amount	Iden- tifi- cation Number	Name of Source
Social Security	Monthly			Social Security Admini- stration
Black Lung Benefits	Monthly			
Railroad Retirement Benefits	Monthly			Railroad Retire- ment Board
Federal Civil Service Annuity	Monthly			Civil Service Commission



Veterans

Benefits

 Pension

 Compensation

 Education

State or

Local

Government

Pension

Unemployment

Compensation

Workmen's

Compensation

Private

Pension

Insurance

Annuity or

Proceeds

Veterans

Admini-

stration



Rent,

Dividend,

Interest, or

Royalties

— Aid to

Families

— Bureau of

Indian

Affairs

— State/Local

Assistance

Cash Support

or Someone

pays expenses

(Explain in "Remarks")

Other

Other

Other

Other

Other



Other _____

Other _____

Other _____

Other _____

Other _____

* If you are not receiving this income this month but expect it, enter the date you think you will receive it.

- Include the amount deducted from the check for Medicare Part B premiums, if any

- Include any amounts deducted for taxes, health insurance, or other voluntary reasons or garnishment

REAL ESTATE

4. **Real Estate:** Do you own or are you buying any real estate (land or buildings or other structures on the land)? x YES NO

If yes, give the following information and answer questions 4-8.

(a) OWNER:

(A) X (B) X

(b) DESCRIPTION OF PROPERTY (Include type and size of structures, amount of acreage or lot size, location of property):

6 rooms, 2 baths home

80' x 200 ' lot

(c) USE (Describe how the property is used. If not in use, give date of last use and next planned use.):

live in

(d) ESTIMATED CURRENT MARKET VALUE:

38,000

(e) TAX ASSESSED VALUE IF KNOWN:

38,000

5. Explain what the basis is for your estimate of the current market value shown in 4(d):

Tax value

6. Is any of the real estate used to produce income (either from a trade or business or from rentals)?

 YES x NO

If yes, give the following information:

- (a) Name and address of mortgage or lien holder, if any, or "None"
- (b) Amount of mortgage or lien outstanding

7. Are you the sole owner(s) of the real estate? If no, give the names and addresses of the other owners, their percentage of



ownership and identify the property interest.

☒ YES ☐ NO

Names

Addresses

Percent

Property Interest

8. Are you free to sell the real estate? If "No," please explain.

☒ YES ☐ NO

OTHER PROPERTY. If you are making a complete statement, answer each of the questions 9-12 and explain all cash, other property, or valuables you own. Show who the owner is by placing a check mark in column (A) or (B). If both (A) and (B) own it, check both columns. Report an item even if you share ownership with someone else. Explain who else owns a share in the Remarks.

9. Do you have a motor vehicle or mobile home or houseboat?

x YES NO

If yes, give the following information:

Owner: (A) X (B) X

Year: 1975

Make and Model: Chevrolet

 Title 19359817C

How is the vehicle used? Gen use

If used to produce income, how much is owed on the vehicle?

Owner: (A) (B) X

Year: 1974

Make and Model: Olds

How is the vehicle used? Drive to
 work & Medical

If used to produce income, how much is owed on the vehicle?



10. Do you own life insurance policies with face values totaling more than \$1500 per person?

 Yes x No Not Sure

If yes or not sure, give the information you know about your life insurance policies:

Owner	(A)	(B)	Name of Insured
Company			Face Value
Policy Number			How many years has it been in force?

11. Look at each line below and check yes if at (sic) applies to you. If you answer yes, fill in the rest of the line for the item. If it does not apply, check no.

Owner A

Cash:	<u>Yes</u>	<u>\$ 50.00</u>
Checking Accounts	<u>Yes</u>	<u>\$770.00</u>



1st Citizens Bank

Richlands, NC

Savings Accounts	<u>No</u>
Savings Certificates	<u>No</u>
U.S. Savings Bonds	<u>No</u>
Stocks	<u>No</u>
Bonds	<u>No</u>
Other Items Easily Changed to cash (specify)	<u>No</u>

Owner B

Cash	<u>No</u>
Checking Accounts	<u>No</u>
Savings Accounts	<u>No</u>
Savings Certificates	<u>No</u>
U.S. Savings Bonds	<u>No</u>
Stocks	<u>No</u>
Bonds	<u>No</u>



Other Items Easily

Changed to cash

(specify)

No

12. Do you have other property and
valuables? YES x NO

If yes, give the following
information. However, for household
goods and personal effects (such as
jewelry, hobby collections, or
personal equipment), list an item
only if it is worth \$500 or more.
For any property which you use to
produce income and owe money on,
explain who has a claim in the
"Remarks."

Owner	(A)	(B)	Item
-------	-----	-----	------

Description	Current Value
-------------	---------------

If used to produce income, how much is
owed?



13. Have you sold any property or given money or property to any person in the last 12 months? ☐ YES ☒ NO

Claimant who is eligible individual
Social Security Number .

14. Do you agree to notify the Social Security Administration immediately about any change in your income and resources (either an increase or decrease)? ☒ YES ☐ NO

15. Do you understand that the information you provide in this statement is subject to verification, and do you authorize sources to release to the Social Security Administration information needed to verify your statements?
☒ YES ☐ NO



REMARKS

I owe \$1500 on Olds & \$3000 on Corvette.

I have used up all my excess money to
pay the bills. I am trying to sell the
Corvette for \$5000 to pay off the cars
and I hope to obtain a job soon. I have
no income.

I know that anyone who knowingly and willfully makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security commits a crime punishable under Federal or State law or both. I affirm that all information I give in this document or in support of it is true.



SIGNATURES

(A) /s/ Stanley Robert Exner

(B) _____

Mailing Address (Number and street, Apt.
No., P.O. Box, or Rural route):

2000 Oakwood Dr

City and State: Jacksonville NC

Zip Code: 28540

Enter name of County (if any) in which
you live: Onslow

Date (Month, day, year): 6/7/79

Telephone Number(s) at which you may be
contacted during the day: 455-0729

NOTE: If residence address is different
from mailing address show it in
"Remarks."

Your statement does NOT ordinarily have
to be witnessed. If, however, you have

signed by mark (X), two witnesses to the signing who know you must sign below, giving their full addresses.

1. Signature of Witness

Address (Number & street, City,
State & Zip Code)

2. Signature of Witness

Address (Number & street, City,
State & Zip Code)

NOTE: If you are filing this statement on behalf of another person, please print below your full name, followed by your title or relationship to the person (for example, "John J. Jones, Son.")

Name (First, middle initial, last)

Title or Relationship

SSI OVERPAYMENT AND DISPOSITION
DETERMINATION

PAYMENT STATUS OF CASE: N20

DATE OF LAST REDETERMINATION: None

NAME OF OVERPAID PERSON: Anthony Exner

SSN: 220-90-0407

PART 1 - OVERPAYMENT DETERMINATION

1. Cause of Overpayment (Explain)

Explanation Attached

2. Computation of Overpayment (If not
systems detected)

Quarter/Year

Should have been paid

Was actually paid: See SSI RD

Difference O/P U/P

Totals: 3688.40

3. List dates and amount of any refund
on this overpayment made to date

4. Total outstanding overpayment:

\$3688.40

Period overpaid: 09/79 THRU 12/80

5. Recipient notified on (date):

1/19/81

6. Was request for reconsideration
filed? ☒ No ☐ Yes

7. Was request for waiver filed?

☒ No ☐ Yes Give date

PART II - DISPOSITION DETERMINATION

(FROM PAGE 2 DEVELOPMENT)

1. ☐ Waiver ☒ Refund
☐ Adjustment ☐ Suspend collection

Rationale:

2. Was penalty assessed?

☒ No ☐ Yes Give amount

3. Was case referred as potential
fraud? ☒ No ☐ Yes Give date

4. Have reporting responsibilities now
been explained? ☐ No ☒ Yes

Recommended Signature: /s/ D Arnold

Title: CRT Date: 1/19/81

District Office: 334

Approving Signature:

Title: Date:

PART III - WAIVER OVERPAYMENT

1. Without Fault: (Evaluate allegation
or show why presumption met)

2. Check which one of the following, if
any, was met:

☐ A. Impede efficient administration
of the Act (small amount)
Give amount

☐ B. Against equity and good
conscience (Explain)

☐ C. Defeat the purpose of Title

XVI: Deemed: ☐ Yes ☐ No

If not deemed, evaluate ability to repay
(resources limitation and monthly income
vs. monthly expenses):

PART IV - RECOVERY ACTION

1. Adjustment

The rate of adjustment will be \$_____ from _____ (date) to _____ (date) plus final payment of \$_____. If recipient is already having deductions made based on previous overpayment, was this considered in figuring the monthly rate?

___ Yes ___ Not Applicable

2. Refund

Give amount to be refunded _____ on _____ (date) If refund will be made by installment payments to the district office, the rate will be \$_____ per _____. Obtain an SSA-633 and keep it up to date in the folder, (for installment payments).

3. Death Cases

If recipient deceased, is there an estate? YES ___ NO

Describe attempts to recover overpayment
from estate or distributees:

4. Continuing Efforts at Collection

A. If no response to request for
refund, describe followup actions
and results:

B. Was case referred to GAO?

___ Yes (Give date _____.)

___ No. If no explain why not, and
complete C.

___ Amount too small (give amount___)

___ Whereabouts unknown _____

___ Unable to repay (Evaluate)

___ Other (Explain)

C. Suspend collection. If
determination is to suspend
collection, give justification:



OVERPAYMENT WORKSHEET

Name Anthony Exner

A/N 220-90-0407

Months	Amount	Should	Amount	Reason
Over-	Paid	Have	of	for
paid	For	Been	Over-	the
	Each	Paid	pay-	Over-
	Month		ment	pay-
				ment
7/79	208.20	0	624.60	Parent's
8/79	208.20	0		wages
9/79	208.20	0		
10/79	208.20	0	624.60	"
11/79	208.20	0		
12/79	208.20	0		
1/80	208.20	0	624.60	"
2/80	208.20	0		
3/80	208.20	0		



4/80	208.20	0	624.60	"
5/80	208.20	0		
6/80	208.20	0		
7/80	238.00	0	714.00	"
8/80	238.00	0		
9/80	238.00	0		
10/80	238.00	0	476.00	"
11/80	238.00	0		
12/80	0	0		
<u>TOTAL</u>			<u>\$3688.40</u>	



REPORT OF CONTACT

ACCOUNT NUMBER AND SYMBOL: 220-90-0407

NAME OF WAGE EARNER OR SE PERSON:

Anthony Exner

PERSON(S) CONTACTED AND ADDRESSES:

 WE OR SE PERSON

 X OTHER (Specify): Father - Stanley
Exner

CONTACT MADE: DO BO CS

 HOME PHONE: OTHER

DATE OF CONTACT: 2/2/81

SUBJECT:

I called Mr. Exner to find out how he wanted to repay the overpayment. His statement was "I have no damn intentions of paying any of the money back." His reasoning for this is that he states when he went to work he called Linda Byrd at Onslow Cty DSS and reported this to her. She told him that his earnings

had no affect on Anthony's check and there was no need to do anything else. He "complained" that "we better get people working in here that know what's going on." I tried to explain to him that they were 2 separate agencies and that his reporting should have been to us. He felt that by reporting it to DSS, that was sufficient. I asked him if he knew where the SSI check was coming from and he said yes. Then I asked why he didn't report it to us. Again he stated he had and it was our fault that the checks kept coming. (he reported to DSS).

He requested I send him a form so he could request a waiver. This I did.

Signature: /s/ D Arnold

X CRT FR SR Claims/Clerical

District Office: 334

___ Other (Specify)

DATE OF REPORT: 2/2/81



REPORT OF CONTACT

ACCOUNT NUMBER AND SYMBOL: 220-90-0407

NAME OF WAGE EARNER OR SE PERSON:

Anthony Exner

PERSON(S) CONTACTED AND ADDRESSES:

 WE OR SE PERSON

 X OTHER (Specify): Connie Melville -
Onslow DSS

CONTACT MADE: DO BO CS

 HOME PHONE: OTHER

DATE OF CONTACT: 2/2/81

SUBJECT:

I called to talk with Linda Byrd who is on maternity leave. Supervisor (contact) verified that Linda has never had in her worker case load the Exner family and does not understand why she would have had any dealings with them. She stated that it might be best to call her at home (324-3469) and see if she

remembers the conversation Mr. Exner
referred to.

Signature: /s/ D Arnold

X CRT FR SR Claims/Clerical

District Office: 334

 Other (Specify)

DATE OF REPORT: 2/2/81



REPORT OF CONTACT

ACCOUNT NUMBER AND SYMBOL: 220-90-0407

NAME OF WAGE EARNER OR SE PERSON:

Anthony Exner

PERSON(S) CONTACTED AND ADDRESSES:

 WE OR SE PERSON

 X OTHER (Specify): Linda Byrd

CONTACT MADE: DO BO CS

 HOME PHONE: OTHER

DATE OF CONTACT: 2/2/81

SUBJECT:

Mrs. Byrd states that she has never talked with Mr. Exner. She claims she doesn't know the family at all. Mrs. Exner called her and asked if Anthony could get a check from DSS. She explained the requirements and suggested that she file a claim for SSI with us. Mrs. Exner told her that her husband was out of work and would this have any

bearing on entitlement. Her reply was:
"I don't know; you need to check with
Social Security." Contact states that
this was her only contact with Mrs.
Exner. She never even knew they were
receiving SSI and to her knowledge Mrs.
Exner never filed for any benefits. She
is aware of most of our regulations and
when she is not, she tells her clients
to call us directly. She never told the
Exners' (sic) that their income had no
bearing on the amount of SSI Anthony
could receive.

Signature: /s/ D Arnold.

X CRT ___ FR ___ SR ___ Claims/Clerical

District Office: 334

___ Other (Specify)

DATE OF REPORT: 2/2/81

REQUEST FOR RECONSIDERATION

The information on this form is authorized by regulation (20 CFR 404.907 - 404.921 and 416.407 - 416.1421). While your responses to these questions is voluntary, the Social Security Administration cannot reconsider the decision on this claim unless the information is furnished.

NAME OF CLAIMANT: Anthony Exner

NAME OF WAGE EARNER OR SELF-EMPLOYED
PERSON (If different from claimant.):

Stanley R. Exner

SOCIAL SECURITY CLAIM NUMBER:

220-90-0407

SUPPLEMENTAL SECURITY INCOME CLAIM
NUMBER:

SPOUSE'S NAME AND SOCIAL SECURITY NUMBER

(Complete ONLY in Supplemental Security
Income Case): Ex Wife = Edna Leach

CLAIM FOR (Specify type, e.g., retirement, disability, hospital insurance, supplemental security income, etc.): SSI

I do not agree with the determination made on the above claim and request reconsideration. My reasons are:

I don't feel I was properly informed of requirements to notify SSA of income change and inability to repay.

NOTE: If the notice of the determination on your claim is dated more than 65 days ago, include your reason for not making this request earlier. Include the date on which you received the notice of the determination.

I am submitting the following additional evidence (If none, write "None"): Attached

SUPPLEMENTAL SECURITY INCOME

RECONSIDERATION ONLY

(see back of this form)

"I want to appeal your decision about my claim for supplemental security income. I've read the back of this form about the three ways to appeal. I've checked the box below."

 X Case Review Informal
Conference Formal Conference

Signature (First name, middle initial,
last name) (Write in ink):

/s/ Stanley R. Exner

Mailing Address (Number and street),
Apt. No., P.O.Box, or Rural Route): 200
Oakwood Dr

City and State: Jacksonville NC

ZIP Code:28540

Enter Name of County (if any) in which
you now live: Onslow

Date (Month, day, year):12-9-84

Telephone Number:455-0729 AC 919

Witnesses are required ONLY if this
request has been signed by mark (X)
above. If signed by mark (X), two
witnesses to the signing who know the
person requesting reconsideration must
sign below, giving their full addresses.

1. Signature of Witness

Address (Number and street, City,
State, ZIP Code)

2. Signature of Witness

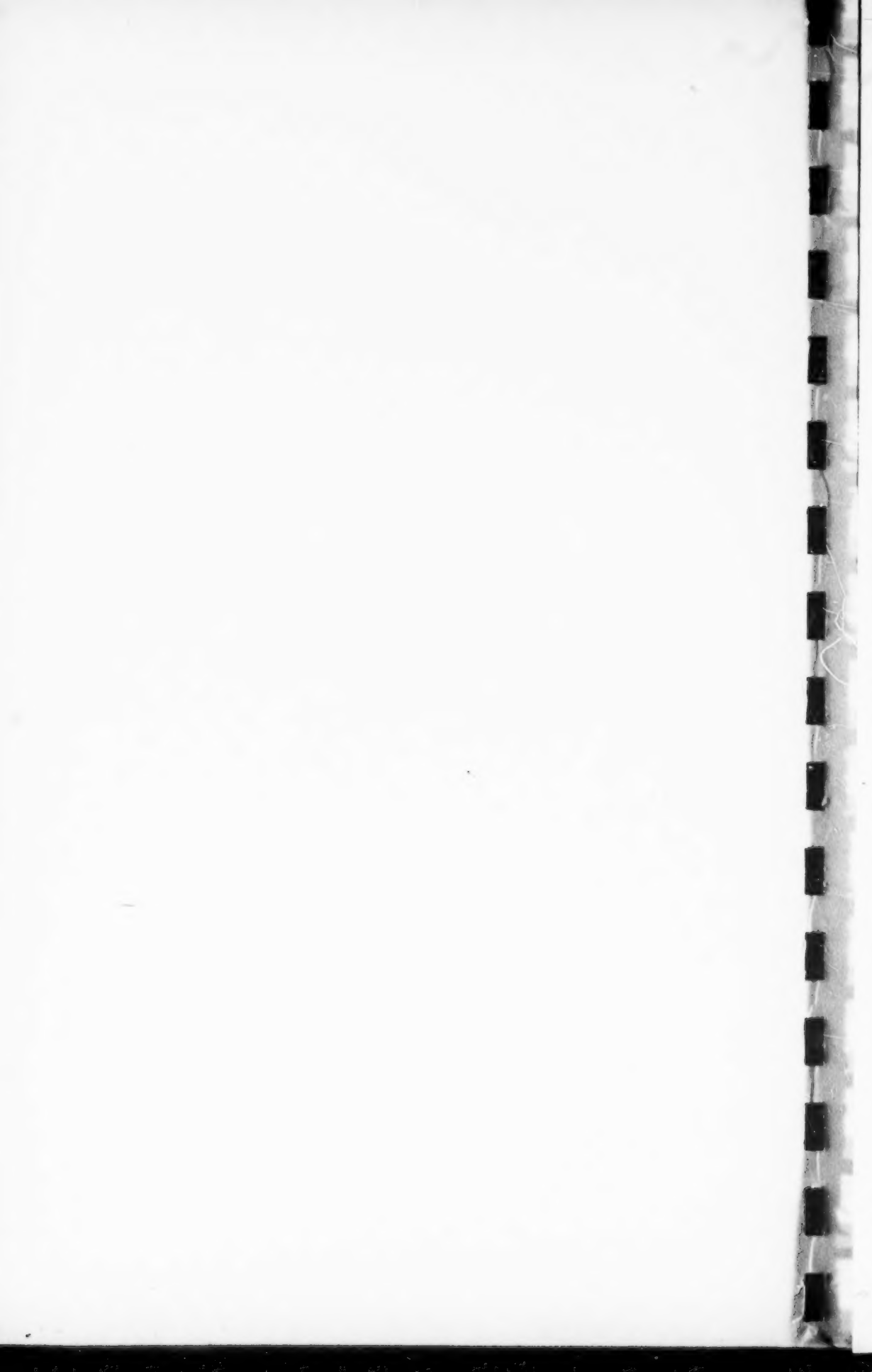
Address (Number and street, City,
State, ZIP Code)

FOR SOCIAL SECURITY OFFICE USE ONLY

Social Security Office Address

Routing Instructions (Check one)

- ___ State Agency (Route with disability
folder)
- ___ Program Service Center
- ___ ODO, Balto
- ___ District Office Reconsideration
- ___ Division of International Operations,
Balto
- ___ OCRO, Balto

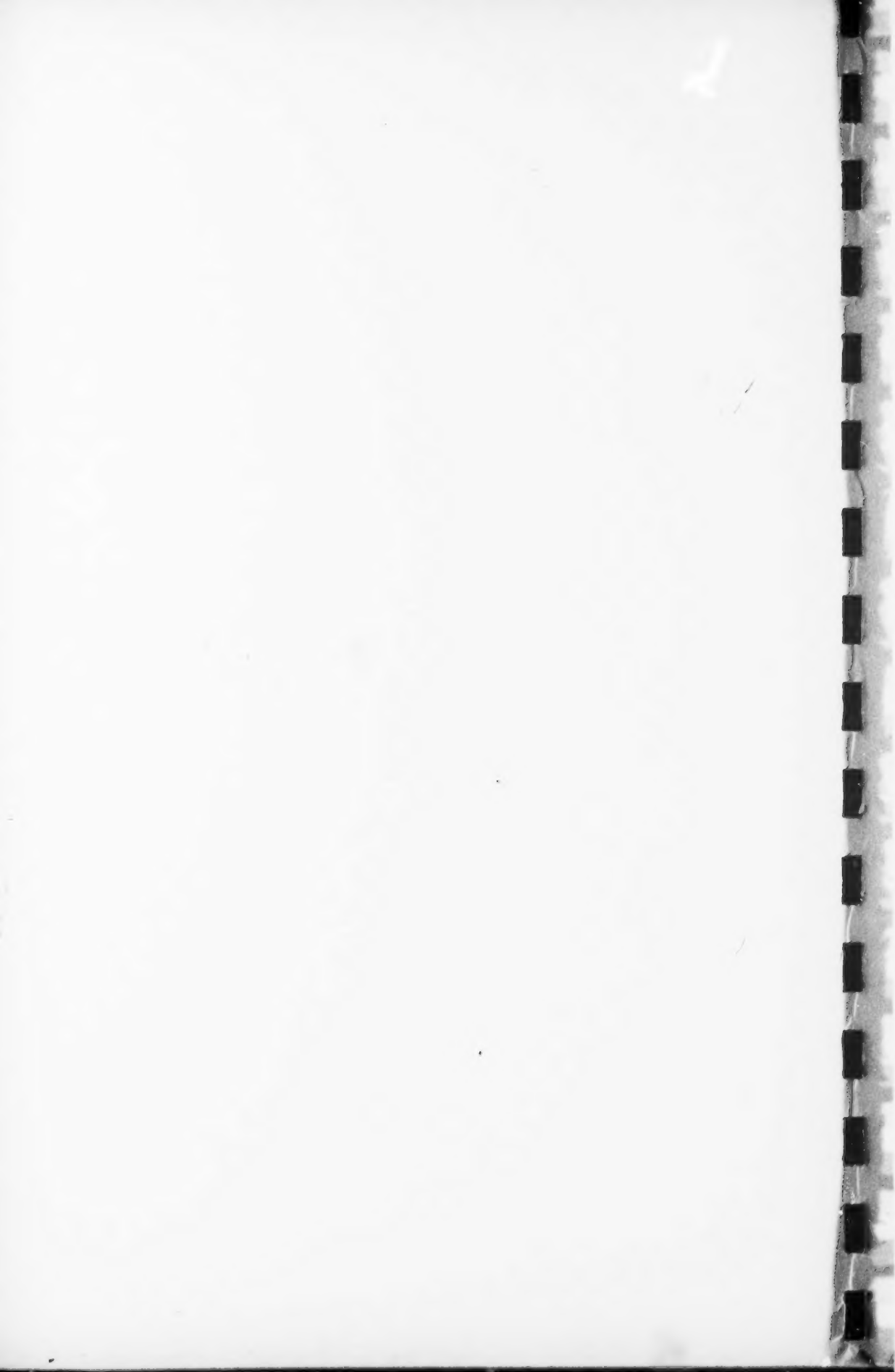


1. In May of 1979, my ex-wife Edna, was informed by personnel at the Camp LeJeune - Onslow County Development Center that we were possibly eligible for SSI payments on behalf of our son, Anthony, who has cerebrial (sic) palsy and is severely retarded. She called the SSA office in New Bern where she was told that our son was eligible for SSI "on his own merit". We then met with a SSA representative in the Jacksonville courthouse. He asked us about our son's condition and our financial status. He told us that we did qualify for SSI. Payments and how much we would receive, and he filed the necessary papers for us. He did not explain to us whe (sic) we qualified or that the qualification was contingent upon our income.

2. About a month after we began receiving (sic) the SSI payments, I got a new job with the Civil Service at Camp LeJeune which increased my income. However, I had explained to the gentleman who interviewed us in Jacksonville that I would be getting this job, and he made no reference to the fact that an increase in income would void our eligibility for SSI payments, nor did he tell me that it would be necessary to report a change in income. All he said was that at the end of the following year (1980), I would be sent a re-evaluation form (about Oct.). However a short time before I received the form, I discovered in the course of a conversation, in response to a letter I received, with someone at the SSA office in New Bern. That because of my

new job, we no longer qualified for the SSI payments. So I reported the change at that time and we stopped recieving (sic) the payments.

3. After looking through everything I have or can find pertaining to the SSI payments and my son's C.P. I discovered a letter dated 8-8-79 from Dept. of Health, Education and Welfare Social Security Administration; paragraph 5 gave the average income of myself and my ex wife. The last sentence said "this amount does not affect his supplemental security income payment. In leiu (sic) of this and my obvious inability to repay because of living expenses and the fact that I don't feel as thought (sic) I was



properly informed of the requirements to
notify SSA of income change, I
respectfully request a reconsideration.

/s/ Stanley R. Exner

SUPPLEMENTAL SECURITY INCOME

NOTICE OF RECONSIDERATION

From: Department of Health,
Education, and Welfare
Social Security Administration
2822 Neuse Blvd
New Bern, NC 28560

Stanley Exner for	Date: 1/18/85
Anthony Exner	Social Security
2000 Oakwood Drive	Number:
Jacksonville, NC 28540	220-90-0407
	Reconsideration
	Filed: 01/13/85

As you requested, your Supplemental Security Income case has been thoroughly reexamined.

This concerns the incorrect Supplemental Security Income payments of \$3,688.40 for Anthony for 9/79-12/80.

7

In your letter you sent to us with your request for reconsideration you quoted paragraph five of your award letter which stated the approximate amounts of income for you and your wife, you again quoted the last sentence of this paragraph which stated "This amount does not affect his (your son's) Supplemental Security Income payment."

However the very next paragraph, paragraph six, states that you are required to report any changes in the circumstances stated in paragraph five, your contention is that you do not feel that you were properly informed of the reporting requirements, but the Award letter you have that you sent us a photocopy of clearly states what the requirements are.

Since you did not make a timely report of the changes to the Social Security Administration you cannot be found without fault in connection with the overpayment, and repayment is required.

Please refund the overpayment of \$3,688.40 immediately. Make your check or money order payable to the Social Security Administration, social security number 220-90-0407 and mail in the enclosed envelope.

Important: See other side for an explanation of your appeal rights and other information.

Please get in touch with social security if:

You believe the decision shown on the other side of this notice is wrong, or

You have any questions or need more information.

Most questions can be handled by phoning or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision in your case is based on incorrect information, we'll be happy to make whatever change is necessary.

YOUR RIGHT TO APPEAL

If you still are not satisfied with the decision, you may request a hearing of this decision by the Bureau of Hearings and Appeals. YOU MUST REQUEST THE HEARING IN WRITING WITHIN 60 DAYS FROM



THE DATE YOU RECEIVE THIS NOTICE. If you cannot send us a written request for a hearing within 60 days, be sure to contact us by phone. If you wait longer than 60 days, we will not conduct a hearing review of our decision unless you have a good reason for the delay.

If you request a hearing, your case will be assigned to an administrative law judge of the Bureau of Hearings and Appeals. He will let you know when and where your case will be heard.

The hearing proceedings are informal. The administrative law judge will summarize the facts in your case, explain the law, and state what must be decided. Then you will have an opportunity to explain why you disagree



with the decision made in your case, to present additional evidence and to have witnesses testify for you. You can also request the administrative law judge to subpoena unwilling witnesses to appear for cross-examination and to bring with them any information about your case. If you decide not to appear at the hearing, you still have the right to submit additional evidence. The administrative law judge will base his decision on the evidence in your file plus any new evidence submitted.

In having your case heard, you can represent yourself or be represented by a lawyer, a friend, or any other person. Contact your social security office for names of organizations that can help you.



(1) In about May or June of 1979, my ex wife, Edna Exner, was informed by Personnel at the Camp LeJeune Onslow County Developmental Center that we were possibly eligible for SSI payments on behalf of our son, Anthony, who has cerebral palsy and is severely retarded. She called the SSA office in New Bern where she was told that our son was eligible for SSI "on his own merit". We then met with a SSA representative in Jacksonville who asked us about our sons (sic) condition and our financial status. He told ut (sic) that we did qualify for SSI payments of 208.00 per month and filed the necessary papers for us. He did not explain to us why we qualified, or that the qualification was contingent upon our income.

(2) About a month after we began receiving (sic) the SSI payments, I got a new job with the Civil Service at Camp LeJeune, which increased my income. However, I had explained to the gentleman who interviewed us in Jacksonville that I would probably be getting this job, and he made no reference to the fact that an increase in income would void our eligibility for SSI payments, nor did he tell me that it would be necessary to report a change in income. All he said was that at the end of the following year (1980) I would be sent a re-evaluation form. However a short time before then (about Oct. 1980) I discovered in the course of a conversation with someone at the SSA office in New Bern that because of my new job, we no longer qualified for the



SSI payments. So I reported the change at that time and we stopped recieving (sic) the payments.

(3) I did not try to limit my earnings because we were under the impression that our retarded son rated the SSI payments "on his own merits." We were never told by any SSA personnel (until Oct 1980) that the benefit payments were contingent upon our income.

(4) Obivously (sic) the conditions under which we would recieve (sic) payments were never fully explained to either my ex-wife or I by any of the SSA personnel we talked to until Oct. 1980. Until this time we thought simply having a retarded child made us eligible for SSI payments, regardless of our income.



(7) The SSI benefits were used largely to help with medical expenses incurred by our retarded son, Andy. In Feb 1980, he suffered severe seizure activity due to his condition and was admitted to Duke University Medical Center for about 8 weeks. During this time either his mother or I stayed in a hotel in Durham to be with him. There were also several other times during the year when Andy was admitted to Onslow Mem. Hospital. The SSI payments helped pay for medical bills not covered by insurance, travel expenses and loss of income; and were essential in keeping us from declaring medical bankruptcy. Other things the SSI payments were used for include special schooling and day care for Andy, special equipment necessary for a handicapped child, ant

(sic) the prescription drugs that Andy takes to control his seizure activity.

To Whom It May Concern

In May 1983, my ex-wife and I seperated (sic); our divorce was finalized in May 1984 and I have since remarried. We have joint custody of Andy and his older sister, Kathy; they live with my wife and I during the week and with their mother on weekends.

While my ex-wife and I were married, we had many financial difficulties since our son's birth due to his severe medical problems. We could have filed medical bankruptcy, however, we chose to try to pay our debts instead. Our divorce has complicated matters further, as there has been some dispute over who should take care of what bills, etc. Please accept my apologies for the delay in completing this waiver.

A-188



I am still trying to recover financially from the hugh debts incurred by Andy's medical problems. The second mortgage on my house has been refinanced four times -- three times to pay medical bills, and the last time as a divorce settlement with my ex-wife. It has been important to me to keep the house so that the children, who stay with me during school periods, would have some sense of stability througout (sic) our divorce.

As you can see from the financial statement, our household is operating in the red. However, my new wife and I are working very hard to correct that, so that our family can live a better life. We have been getting by drawing from our now dwindling savings account and by selling odds and ends from around the



house. We have restored an old car of mine which we anticipate selling in the next month; when we do this, we will finally eliminate the last of our debts (except our two house payments) and we will be able to start over again.

I would gladly repay this debt if I didn't think we had deserved the SSI payments and if I could afford it now. However, I believe my ex-wife and I were misled and misinformed at a very emotionally distraught time in our lives. The SSI payments were greatly appreciated; I don't know how we would have gotten by without them; but if we'd known we weren't eligible for them and would have to pay them back, we certainly would have looked elsewhere for help.

A severly (sic) handicapped child is a tremendous financial and emotional burden, especially when there are many medical problems involved, also. Andy has been doing very well now the the past year; we hope this will continue. I have remarried and for the first time in many years, there is a sense of stability in my family and I will have a chance at starting over, free from financial debt.

/s/Stanley R. Exner

OVERPAYMENT RECOVERY QUESTIONNAIRE

Social Security Claim Number

220-90-0407

Name of Overpaid Person(s)

Anthony Exner

Name of Insured Individual

Privacy Act Notice: If an overpayment has been made, the Social Security Administration (SSA) is required by law* to recover such amount unless recovery of the overpayment may be waived. Recovery of an overpayment may be waived only if you are not at fault in connection with the overpayment AND recovery would deprive you of income necessary to meet your ordinary living expenses or would be otherwise unfair. The information requested on this form is authorized by law and will enable SSA to determine whether recovery may be



waived. If SSA determines that recovery may not be waived, the financial information on this form may be important in establishing the rate of recovery or the extent of the recovery efforts. Disclosure of information requested on this questionnaire is voluntary, but failure to provide the information requested may result in a denial of your request for waiver, and, if SSA is unable to recover the overpayment, it may be necessary to report the overpayment to the General Accounting Office for further collection effort.

The information you furnish on this form may be disclosed by SSA to another person or to another government agency for the following purposes:



- 1) to assist SSA in establishing the right of an individual to social security or black lung benefits and/or the amount thereof;
- 2) to facilitate statistical research and audit activities necessary to assure the integrity and improvement of the programs administered by SSA; and
- 3) to comply with Federal laws requiring the exchange of information between SSA and another agency (such as the General Accounting Office).

*Sections 204, 1631(b), and 1870 of the Social Security Act, as amended (42 United States Code 404, 1383, and 1395gg) and section 413(b) of the Federal Coal Mine Health and Safety Act

of 1969, as amended (30 United States Code 923(b)).

PART I - WITHOUT FAULT STATEMENT

(To be completed by all applicants for waiver)

1. Explain fully why you thought the incorrect payment was due you and why the overpayment was not your fault. Attached.

2. Did you report the change which affected your monthly payment?

x Yes No

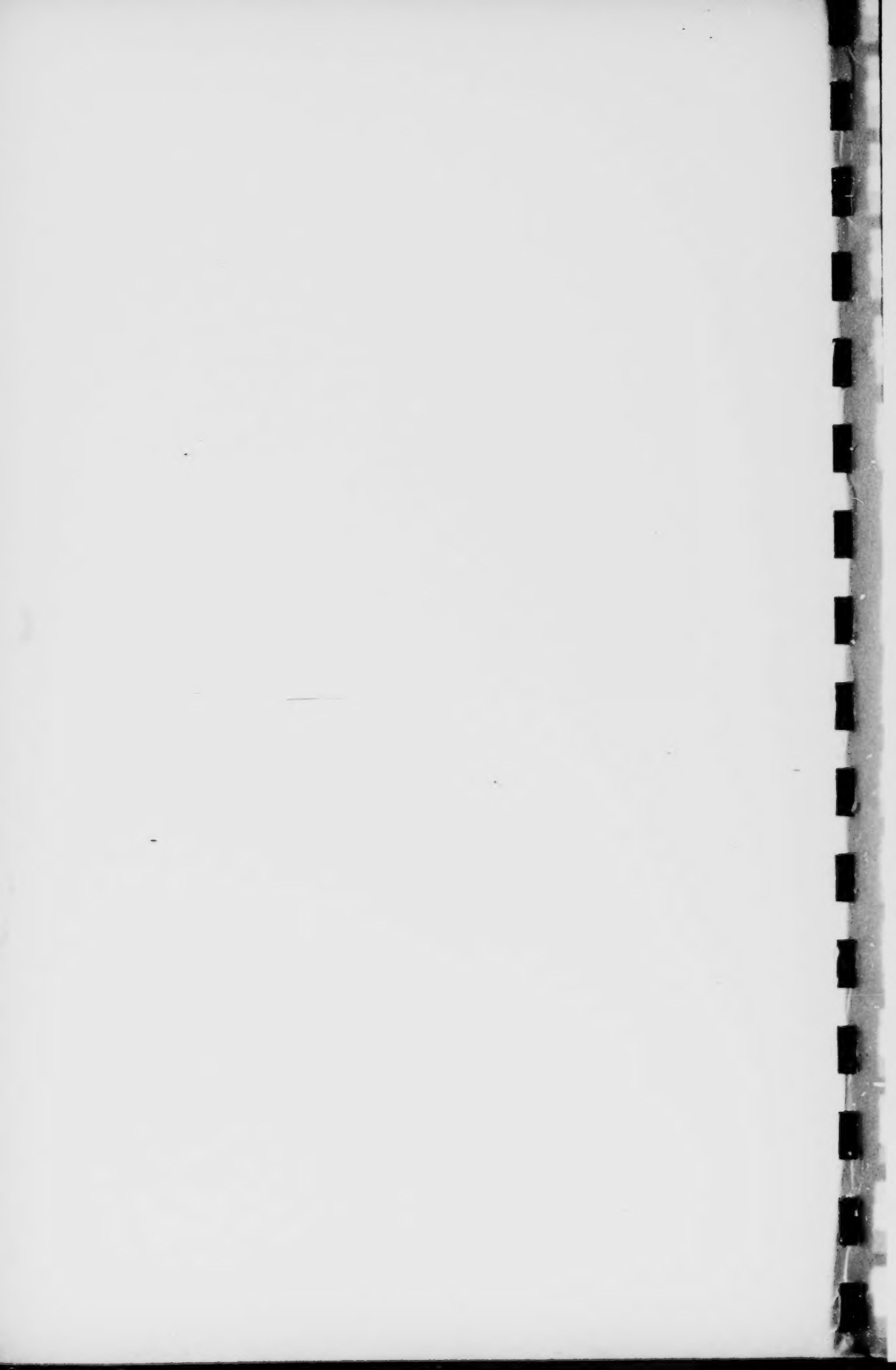
If "YES" when did you report?

(Give date)

If "NO" why didn't you report?

Attached

3. If you are overpaid because of your earnings, what did you do to limit your earnings? Attached



4. When were the conditions under which you could receive payments first explained to you? The conditions were explained to my ex-wife.

Attached

5. Do you NOW fully understand reporting responsibilities?

x Yes No

If "No," explain:

PART II - REPRESENTATIVE PAYMENT MADE

(To be completed ONLY by a representative payee)

6. Give the name and present address of the person for whom you received payment: Anthony Earl Exner, 2000 Oakwood Dr. Jacksonville, N.C.

7. Were the incorrect payments used for this person? x Yes No

Explain: The payments received under SSI were used to help with the



expense of school and to help us when
(sic) Andy was in the hospital.

PART III - POSSESSION OF OVERPAYMENT

(To be completed by all applicants for
waiver)

8. Do you have any of the incorrectly
paid checks or payments in your
possession? ☐ Yes ☒ No

If "Yes," show the total amount

\$ _____

THESE FUNDS SHOULD BE RETURNED TO SOCIAL
SECURITY IMMEDIATELY.

9. Have you transferred by loan, gift,
sale, etc. any property or cash
since you were notified of the
overpayment? ☐ Yes ☒ No

If "Yes," explain:

10. Have you been notified that you will
receive an inheritance from a person
who died recently? ☐ Yes ☒ No

If "Yes," explain:

PART IV - REFUND QUESTIONNAIRE

(To be completed by the person for whom repayment of the overpayment would cause undue hardship)

11. LIST YOUR MONTHLY INCOME (including any income of your spouse or any dependent relative living in the household with you) from:

	MONTHLY INCOME
Social Security Benefits	\$ 0
Supplemental Security	
Income payment	\$ 0
State of local welfare	
payment. Specify:	\$ 0
Other benefits, such as	
Veterans Administration,	
civil service, unemploy-	
ment, Black Lung, railroad,	

private pension, etc. \$ 0

Specify:

Earnings (take-home wages
and average net earnings
from self-employment.

Specify: \$1,270

Other income, such as
dividends, interest,
rentals, roomers or

boarders, etc. Specify: \$ 0

TOTAL MONTHLY INCOME \$1,270

12. Do you support, either fully or in
part, anyone other than yourself?

___ Yes ___ No

If "Yes," give the following
information about each person you
support:



Name	Address	Age	Relation- ship to you (If none, enter "None"
------	---------	-----	---

Laurie	2000	23	wife
D. Exner	Oakwood Drive		
Kathryn	"	11	daughter
C. Exner			
Anthony	"	6	son
E. Exner			

13. LIST THE USUAL EXPENSES OF YOUR
HOUSEHOLD ON A MONTHLY BASIS:

	MONTHLY PAYMENT
Rent or mortgage, including property tax	\$ 706.--
Food	\$ 240.--

Clothing	\$
Utilities (electricity, gas, fuel, telephone, water)	\$ 130.--
Miscellaneous household expenses (repairs, cleaning supplies, etc.)	\$ 15.--
Insurance (life, auto- mobile, medical, house- hold, etc.)	\$ 43.--
Medical and dental care (not covered by insurance)	\$ 15.--
Automobile expenses (gas, oil, maintenance) or other transportation costs	\$ 100.--
Other expenses (such as newspapers, barber, toilet articles, etc.) Specify:	\$
Other debts being paid by monthly installments:	



Creditor	Amount Owed	Monthly Payment
Marine Fed. Credit Union	\$1000	\$ 50--
Navy Fed. Credit Union	\$ 500	\$ 42--
Duke Medical Center	\$ 380	\$ 10--
Worrells	\$ 60	\$ 5--
Visa	\$1024	\$ 20--TOT
Sears	\$ 514	\$ 20--139

14. (a) Not counting your home, family automobile, or household furnishings, do you or your spouse own any valuable property or real estate?

 Yes x No

If "Yes," specify and give current market value, If mortgage, show amount of mortgage.



(b) List the amount of any funds
you have (including those of
your spouse, if you live with
your spouse):

Cash on hand \$ 0

Checking account balance \$ 120.00

Name and address of
financial institution(s):

Marine Federal Credit Union

Bldg 58

Camp LeJeune, NC 28542

Savings account balance \$ 75.00

Name and address of
financial institution(s):

Peoples Bank

Country Club Rd.

Jacksonville, NC 28540

Current value of any
stocks and bonds \$ 0



Other personal property
valued at more than \$500
or trust funds? Explain

\$ 0

TOTAL

\$ 195.00

REMARKS:

I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law and/or State law. I affirm that all information I have given in this document is true.

SIGNATURE OF OVERPAID PERSON OR
REPRESENTATIVE PAYEE

SIGNATURE (First name, initial, last
name) (Write in ink)

SIGN HERE: s/Stanley R. Exner

s/Edna B. Exner

DATE (Month, day, year): Aug 12, 1984

TELEPHONE NUMBER: 455 0729

MAILING ADDRESS (Number and street, Apt.
No., P.O. Box, or Rural Route)

2000 Oakwood Drive

City and State Jacksonville NC

Zip Code 28540

Enter name of county (if any) in which
you now live: Onslow

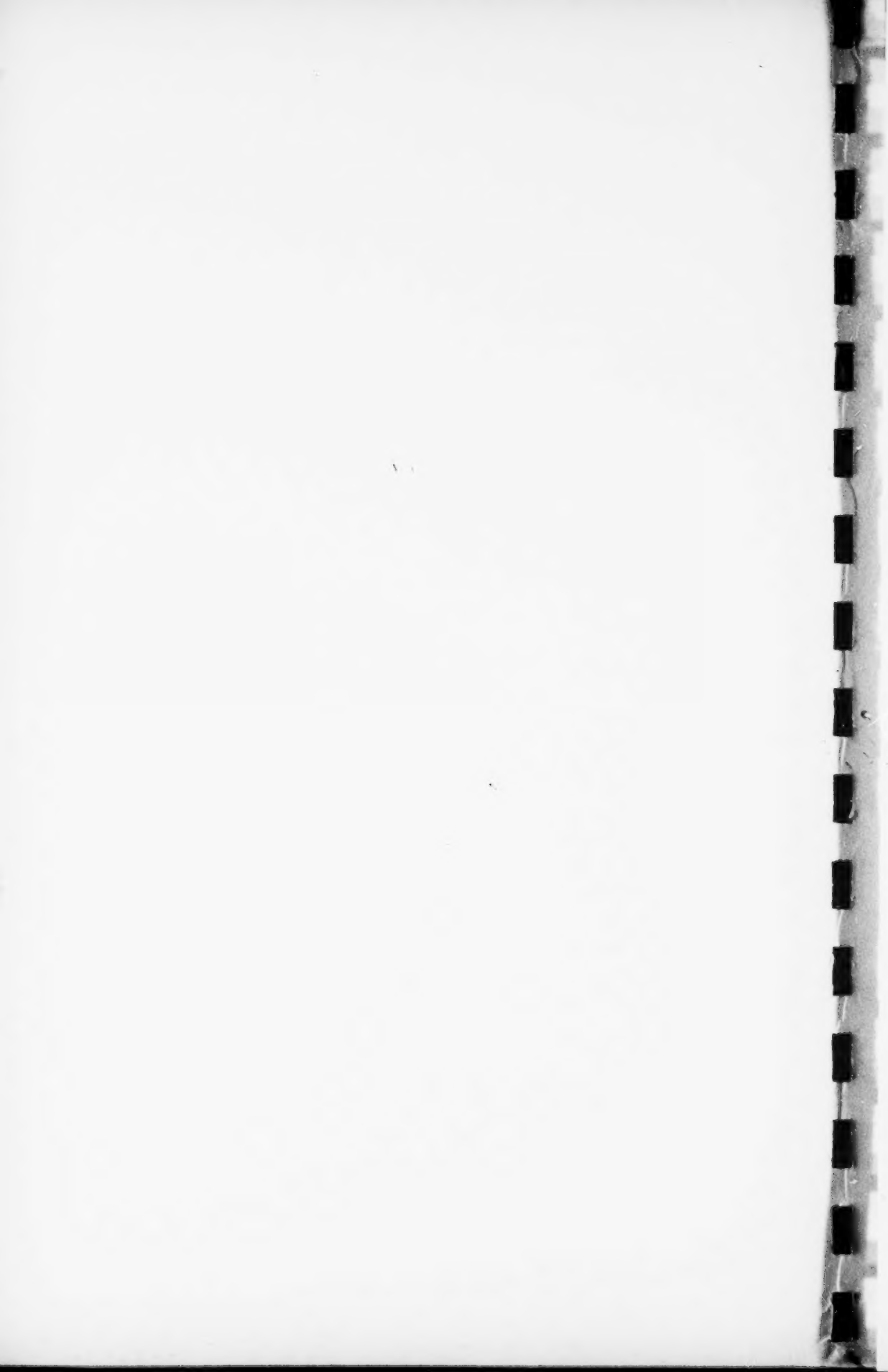
Witnesses are required ONLY if this
statement has been signed by mark (X)
above. If signed by mark (X), two
witnesses to the signing who know the
individual must sign below, giving their
full addresses.

1. SIGNATURE OF WITNESS

ADDRESS (Number and street, City
State, and ZIP Code)

2. SIGNATURE OF WITNESS

ADDRESS (Number and street, City
State, and ZIP Code)



SSI OVERPAYMENT AND DISPOSITION
DETERMINATION

PAYMENT STATUS OF CASE:

DATE OF LAST REDETERMINATION:

NAME OF OVERPAID PERSON:

Stanley Exner for Anthony Exner

SSN: 220-90-0407

NAME OF ELIGIBLE SPOUSE:

SSN:

PART I - OVERPAYMENT DETERMINATION

1. CAUSE OF OVERPAYMENT (Explain)
2. COMPUTATION OF OVERPAYMENT (If not
systems detected)

QUARTER/YEAR

SHOULD HAVE BEEN PAID

WAS ACTUALLY PAID

DIFFERENCE O/P U/P

TOTALS:

3. LIST DATES AND AMOUNTS OF ANY REFUND
ON THIS OVERPAYMENT MADE TO DATE

4. TOTAL OUTSTANDING OVERPAYMENT \$
PERIOD OVERPAID MO.,YR., THRU MO.,
YR.,
5. RECIPIENT NOTIFIED ON (DATE)
6. WAS REQUEST FOR RECONSIDERATION
FILED? ___ NO ___ YES
7. WAS REQUEST FOR WAIVER FILED?
___ NO X YES
GIVE DATE 10/22/84

PART II - DISPOSITION DETERMINATION
(FROM PAGE 2 DEVELOPMENT)

1. ___ WAIVER ___ REFUND
___ ADJUSTMENT ___ SUSPEND COLLECTION
RATIONALE: Waiver is denied -
Recipient cannot be found without
fault since he did not report that
father had returned to work; Also,
file shows that payee is financ
(sic) able to repay the overpayment.



2. WAS PENALTY ASSESSED?

 X NO YES GIVE AMOUNT

3. WAS CASE REFERRED AS POTENTIAL
FRAUD?

 X NO YES GIVE AMOUNT

4. HAVE REPORTING RESPONSIBILITIES NOW
BEEN EXPLAINED?

 NO X YES

RECOMMENDING SIGNATURE /s/ D Arnold

TITLE CR

DATE 11/26/84

DISTRICT OFFICE New Bern, NC

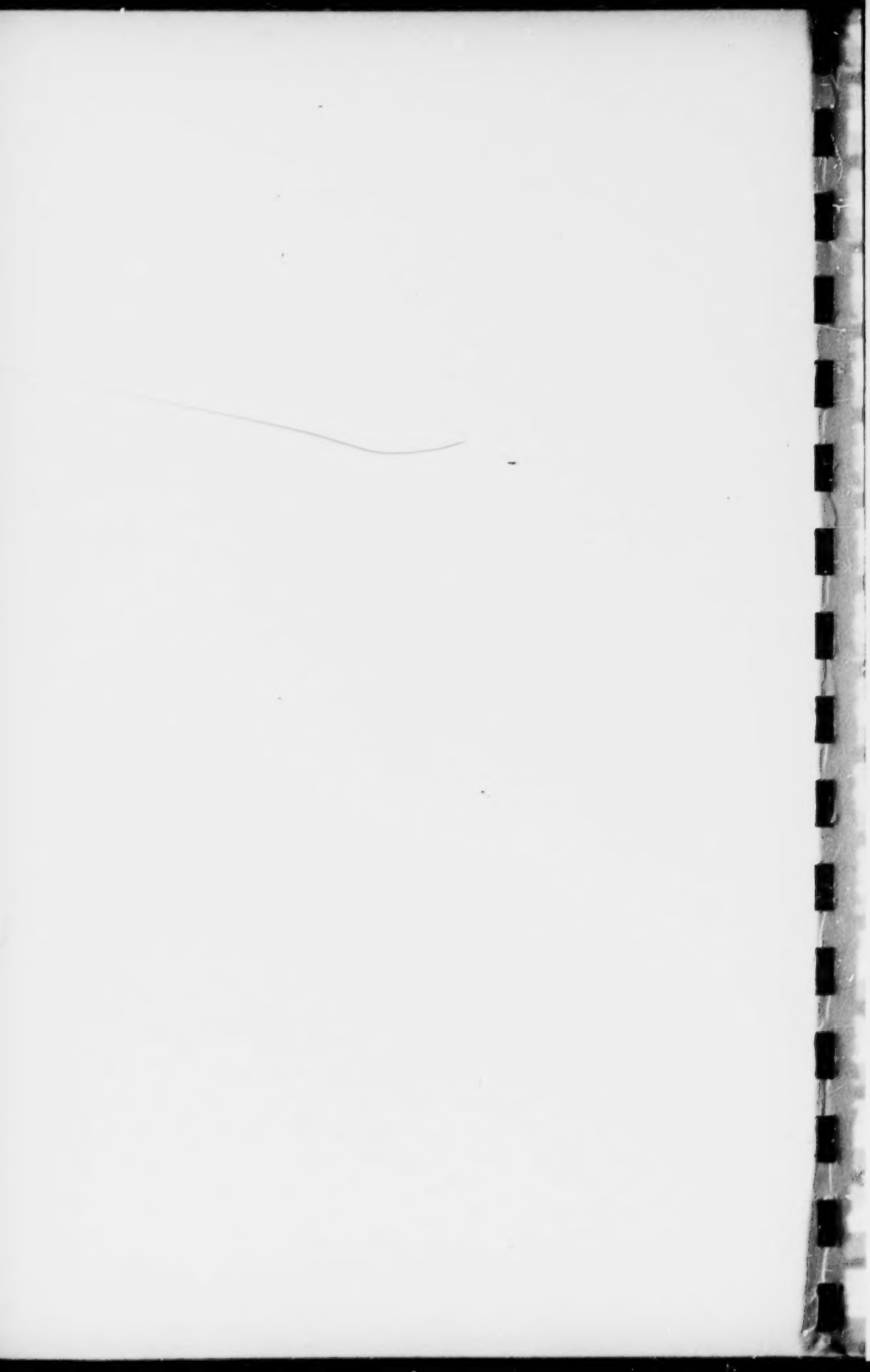
APPROVING SIGNATURE

TITLE

DATE

PART III - WAIVER DEVELOPMENT

1. WITHOUT FAULT: (Evaluate allegation
or show why presumption met)
recipient not found to be without
fault.



2. CHECK WHICH ONE OF THE FOLLOWING, IF ANY, WAS MET:

 A. IMPEDE EFFICIENT OR. EFFECTIVE
ADMINISTRATION OF THE ACT
(small amount). GIVE AMOUNT

 B. AGAINST EQUITY AND GOOD
CONSCIENCE (Explain)

 C. DEFEAT THE PURPOSE OF TITLE
XVI: DEEMED YES NO
IF NOT DEEMED, EVALUATE ABILITY
TO REPAY (resources limitation
and monthly income vs. monthly
expenses):

PART IV - RECOVERY ACTION

1. ADJUSTMENT

The rate of adjustment will be
\$ from (date) to
(date) plus final payment \$. If
recipient is already having
deductions made based on previous



overpayment, was this considered in
figuring the monthly rate?

 Yes Not Applicable

2. REFUND

Give amount to be refunded _____
on _____ (date) If refund will be
made by installment payments to the
district office, the rate will be
\$ _____ per _____. Obtain an SSA-633
and keep it up to date in the
folder, (for installment payments).

3. DEATH CASES

If recipient deceased, is there an
estate? Yes No

Describe attempts to recover
overpayment from estate or
distributees.

4. CONTINUING EFFORTS AT COLLECTION

A. If no response to request for
refund, describe followup
actions and results:



B. Was case referred to GAO?

___ Yes (Give date ____).

___ No. If no explain why not,
and complete C.

___ AMOUNT TOO SMALL (GIVE
AMOUNT ____)

___ WHEREABOUTS UNKNOWN

___ UNABLE TO REPAY (Evaluate)

___ OTHER (Explain)

C. Suspend collection. If
determination is to suspend
collection, give justification:

EXNER FAMILY FINANCIAL REPORT

(MONTHLY)

"SUBMITTED BY (/s/ Rep Glancy)"

Income (Net)	\$1,495.00/mo.
House payment:	\$ 257.32 (Coop. S&L)
2nd Trust deed:	\$ 446.00 (MFCU)
Car payment	\$ 231.70 (MFCU)
Open-end loan	40.00 (MFCU)
Willis, Vanck, Ball, (K.C.) Ortho.	50.00
MPDC (Andy)	10.00
NBAA (Andy)	20.00
Psychiatric Assoc. (K.C.	10.00
Utilities	135.00
Insurance (H.O. & Auto)	45.00
Sears	25.00
Visa	50.00

Gas	\$ 50.00
Groceries	250.00
Andy's medication	20.00
Andy's diapers	<u>25.00</u>
	\$1,620.02

Mo. Expenses

1620

1495 - income

125 - mo. debit

No Stock or Bonds

Checking acct. #115180, Balance: \$144.00

Marine Federal Credit Union, Jax NC

Deposit 1495.00/mo, used to pay above
bills

Savings acct. #115180, Balance: \$5.00

Marine Federal Credit Union, Jax NC

/s/Stanley R. Exner

11-7-85

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
NO. 86-59-CIV-4

STANLEY A. EXNER,)

Plaintiff,)

) MOTION FOR

v.) JUDGMENT ON

) THE PLEADINGS

OTIS R. BOWEN,) OR SUMMARY

Secretary of) JUDGMENT

Health and Human)

Services,)

Defendant.)

Plaintiff moves the Court for
judgment on the pleadings, or for
summary judgment based upon the record
in this case and the arguments and
authorities cited in Plaintiff's

Memorandum in support of this Motion.
Plaintiff moves the Court to remand this
action to the Secretary for further
proceedings, including a new hearing
before an administrative law judge.

This the 16th day of January, 1987.

LEGAL SERVICES OF THE
LOWER CAPE FEAR

BY: /s/ James J. Wall

JAMES J. WALL

Attorney for Plaintiff

16 South Front Street

Post Office Box 814

Wilmington, North.

Carolina 28402

(919) 763-6207

CERTIFICATE OF SERVICE

The undersigned hereby certifies
that he has served the foregoing and
annexed MOTION FOR JUDGMENT ON THE

PLEADINGS OR SUMMARY JUDGMENT upon the Defendant by mailing a true copy of the same in the United States Mail, first-class postage prepaid, addressed to: Mr. Rudolph A. Renfer, Jr., Assistant United States Attorney, Civil Section, Post Office Box 26897, Raleigh, North Carolina 27611.

This the 16th day of January, 1987.

/s/ James J. Wall

JAMES J. WALL

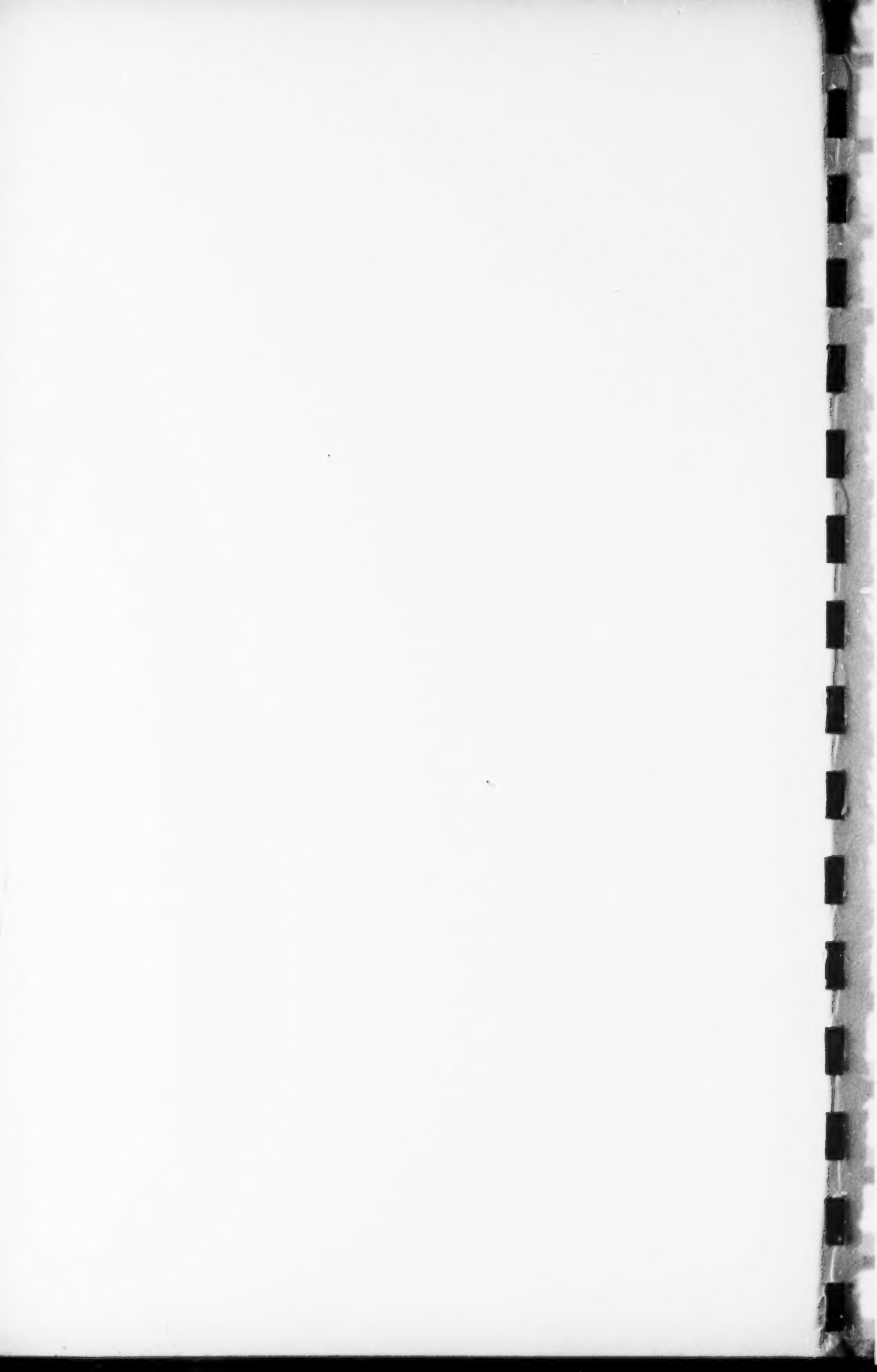
Attorney for Plaintiff



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
No. 86-59-CIV-4

STANLEY A. EXNER,)	
Plaintiff,)	
	)	MOTION FOR
vs.	)	EXTENSION
	)	OF TIME
OTIS R. BOWEN,)	
M.D., Secretary)	
of Health and)	
Human Services,)	
Defendant.)	

NOW COMES the Defendant, by and through the undersigned Assistant United States Attorney for the Eastern District of North Carolina, and hereby moves the Court for an extension of time up to and



including the 16th day of April, 1987,
this being the first extension in which
to respond to plaintiff's Motion for
Judgment on the Pleadings.

Attorney for plaintiff has been
contacted and he does not consent to
this motion for extension of time.

This the 17 day of March, 1987.

SAMUEL T. CURRIN

United States Attorney

BY: /s/ R. A. Renfer, Jr.

R. A. RENFER, JR.

Assistant United States
Attorney

Civil Section

P. O. Box 26897

Raleigh, NC 27611

Telephone: (919) 856-4530

CERTIFICATE OF SERVICE

I certify I have on this 17 day of March, 1987, served the foregoing upon plaintiff's counsel by mailing same in a postpaid envelope to:

James J. Wall, Esquire

Attorney at Law

P. O. Box 814

Wilmington, N. C. 28402

/s/ R. A. Renfer, Jr.

R. A. RENFER, JR.

Assistant United States

Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
FILE NO. 86-59-CIV-4

STANLEY A. EXNER,)	
Plaintiff,)	
)	
v.	)	RESPONSE
	)	AND
OTIS R. BOWEN,	)	MOTION
M.D., Secretary of)	
Health and Human)	
Services,)	
Defendant.)	

Plaintiff opposes Defendants (sic)
Motion For An Extension of Time to
respond to Plaintiff's Motion for
Judgment On The Pleadings. Plaintiff
moves the Court for entry of default and

default judgment against the Defendant,
to deny Defendant the right to file a
late response or cross motion and
memorandum for judgment on the
pleadings, and to render judgment based
upon the record in this case and
Plaintiff's motion for judgment on the
pleadings and supporting memorandum.

Respectfully submitted this the
19th day of March, 1987.

LEGAL SERVICES OF THE

LOWER CAPE FEAR

BY: /s/ James J. Wall

JAMES J. WALL

16 South Front Street

Post Office Box 814

Wilmington, North

Carolina 28402

(919) 763-6207

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing
RESPONSE AND MOTION thereof has been
served upon Defendant by mailing a true
copy of the same to: Mr. Rudolph A.
Renfer, Jr. Assistant United States
Attorney, Post Office Box 26897,
Raleigh, North Carolina 27611.

This the 19th day of March, 1987.

/s/ James J. Wall

JAMES J. WALL

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
No. 86-59-CIV-4

STANLEY A. EXNER,)

Plaintiff,)

)

v.)

O R D E R

)

OTIS R. BOWEN,)

M.D., Secretary)

of Health and)

Human Services,)

Defendant.)

For good cause having been shown upon defendant's Motion for Extension of Time, it is hereby ORDERED that the defendant have up to and including the



16th day of April, 1987, in which to
respond to the Motion for Judgment on
the Pleadings filed herein.

This the 18 day of March, 1987.

/s/ J. Rich Leonard

J. RICH LEONARD

Clerk, United States

District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
FILE NO. 86-59-CIV-4

STANLEY A. EXNER,)
 Plaintiff)
) MOTION FOR ENTRY
) OF DEFAULT AND
v.) DEFAULT JUDGMENT
)
OTIS R. BOWEN,)
M.D., Secretary)
of Health and)
Human Services,)
 Defendant.)

Plaintiff moves the Court for entry
of default and default judgment against
the Defendant based upon Defendant's
failure to timely file a response to

Plaintiff's motion for judgment or file a cross-motion and supporting memorandum. Plaintiff prays the Court as a sanction to strike the answer of the Defendant and to enter judgment based upon the record in this case and Plaintiff's motion for judgment on pleadings and supporting memorandum. Plaintiff prays the Court to reverse the decision of the Secretary and adjudge that Plaintiff was without fault in receiving an overpayment of SSI benefits for his son, Anthony Exner, and that recovery of the overpayment would defeat the purposes of the Social Security Act, and be against equity and good conscience, as well as impede the efficient and effective administration of the Social Security Act.

In the alternative, Plaintiff prays the Court to reverse and remand this matter to the Secretary for further proceedings.

Respectfully submitted this the 23rd day of April, 1987.

LEGAL SERVICES OF THE LOWER
CAPE FEAR

BY: /s/ James J. Wall

JAMES J. WALL

Attorney for Plaintiff

16 South Front Street

Post Office Box 814

Wilmington, North Carolina

28402

(919) 763-6207

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing and annexed MOTION FOR ENTRY OF DEFAULT AND DEFAULT

JUDGMENT upon Defendant by mailing a true copy of the same in the the U.S. Mail, first-class postage prepaid, addressed to: Mr. Rudolph Renfer, Jr., Assistant United States Attorney, Post Office Box 26897, Raleigh, North Carolina 27611.

This the 23rd day of April, 1987.

/s/ James J. Wall

JAMES J. WALL

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
No. 86-59-CIV-4

STANLEY A. EXNER,)	
Plaintiff,)	
	)	MOTION FOR
vs.	)	PERMISSION
	)	TO FILE OUT
OTIS R. BOWEN,	)	OF TIME
M.D., Secretary)	
of Health and)	
Human Services,)	
Defendant.)	

NOW COMES the Defendant, by and through the undersigned Assistant United States Attorney for the Eastern District of North Carolina, and moves this Court

for permission to file its Motion for Judgment on the Pleadings out of time.

This document should have been filed with the Court on April 16, 1987, therefore, is twelve days late.

Respectfully submitted this 28th day of April, 1987.

SAMUEL T. CURRIN

United States Attorney

BY: /s/ Steven A. West

(for) R. A. RENFER, JR.

Assistant United States
Attorney

Civil Section

P. O. Box 26897

Raleigh, NC 27611

Telephone: (919) 856-4530



CERTIFICATE OF SERVICE

I certify I have on this 28th day
of April, 1987, served the foregoing
upon plaintiff's counsel by mailing same
in a postpaid envelope to:

James J. Wall, Esquire

Attorney at Law

P. O. Box 814

Wilmington, N. C. 28402

/s/ Steven A. West

(for) R. A. RENFER, JR.

Assistant United States

Attorney



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
No. 86-59-CIV-4

STANLEY A. EXNER,)

Plaintiff)

)

v.)

ORDER

)

OTIS R. BOWEN,)

M.D., Secretary)

of Health and)

Human Services,)

Defendant)

This cause comes before the court pursuant to 42 U.S.C. § 405(g) for judicial review of a final decision of the Secretary of Health and Human



Services refusing to waive repayment of a Supplemental Security Income (SSI) overpayment. Plaintiff, Stanley A. Exner, contends that he received the payments in good faith and without fault. Defendant, Secretary of Health and Human Services Otis R. Bowen, has counterclaimed for repayment with interest.

On June 7, 1979, Stanley applied for SSI disability benefits on behalf of his disabled eight-year-old child, Anthony Exner. Stanley Exner states that he was unemployed, and that he met the income qualifications when he applied for these SSI benefits. Before Mr. Exner began receiving the benefits, Mr. Exner obtained employment with the federal government under civil service. Mr. Exner claims that the Social



Security representative simply told him that filling out an annual income statement was the only requirement for receiving SSI benefits.

Mr. Exner received these SSI payments for approximately one year before his case came up for income review. After Mr. Exner filed his income statements and disclosed his employment status, the Social Security Administration requested a return of the SSI payments made during the past year. Mr. Exner refused to repay the amount claiming no fault. The government subsequently filed a lawsuit against Mr. Exner for repayment which was stayed pending administrative proceedings. The Administrative Law Judge determined that Mr. Exner was not without fault because he failed to promptly report a change in



income and ordered repayment. The Appeals Council and the Secretary affirmed the Administrative Law Judge's decision. The court heard this case in June 1987, and is now prepared to rule.

The court finds that the clear letter of the law required Mr. Exner to notify the Social Security Administration of any material increases in income. Even if Mr. Exner relied in good faith on some statements made by Social Security personnel, Mr. Exner cannot circumvent the law or abrogate his legal duty to report a change of income. The facts do not support a finding that there was any estoppel against the Social Security Administration or a waiver by the Social Security Administration.

This court hereby ORDERS Stanley A. Exner to repay \$3,688.40 plus interest in Social Security overpayments that were paid on behalf of his disabled son Anthony Exner.

SO ORDERED this 30th day of September, 1987.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE

UNITED STATES DISTRICT

JUDGE



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
FILE NO. 86-59-CIV-4

STANLEY A. EXNER,)	
Plaintiff,)	
	)	MOTION TO ALTER
v.	)	OR AMEND
	)	JUDGMENT
OTIS R. BOWEN,)	-----
M.D., Secretary	)	Rule 59
of Health and	)	F.R.Civ.P.
Human Services,)	
Defendant.)	

NOW COMES the Plaintiff in the
above-captioned matter and respectfully
shows the following to the Court:



1. The Court entered a Judgment in this matter dated September 30, 1987 denying Plaintiff relief and granting Defendant relief on a counterclaim.

2. Plaintiff is unable to determine if the Court has ruled upon Plaintiff's pending Motion for Entry of Default and Default Judgment against the Defendant.

3. The Court improperly granted Defendant relief upon Defendant's counterclaim.

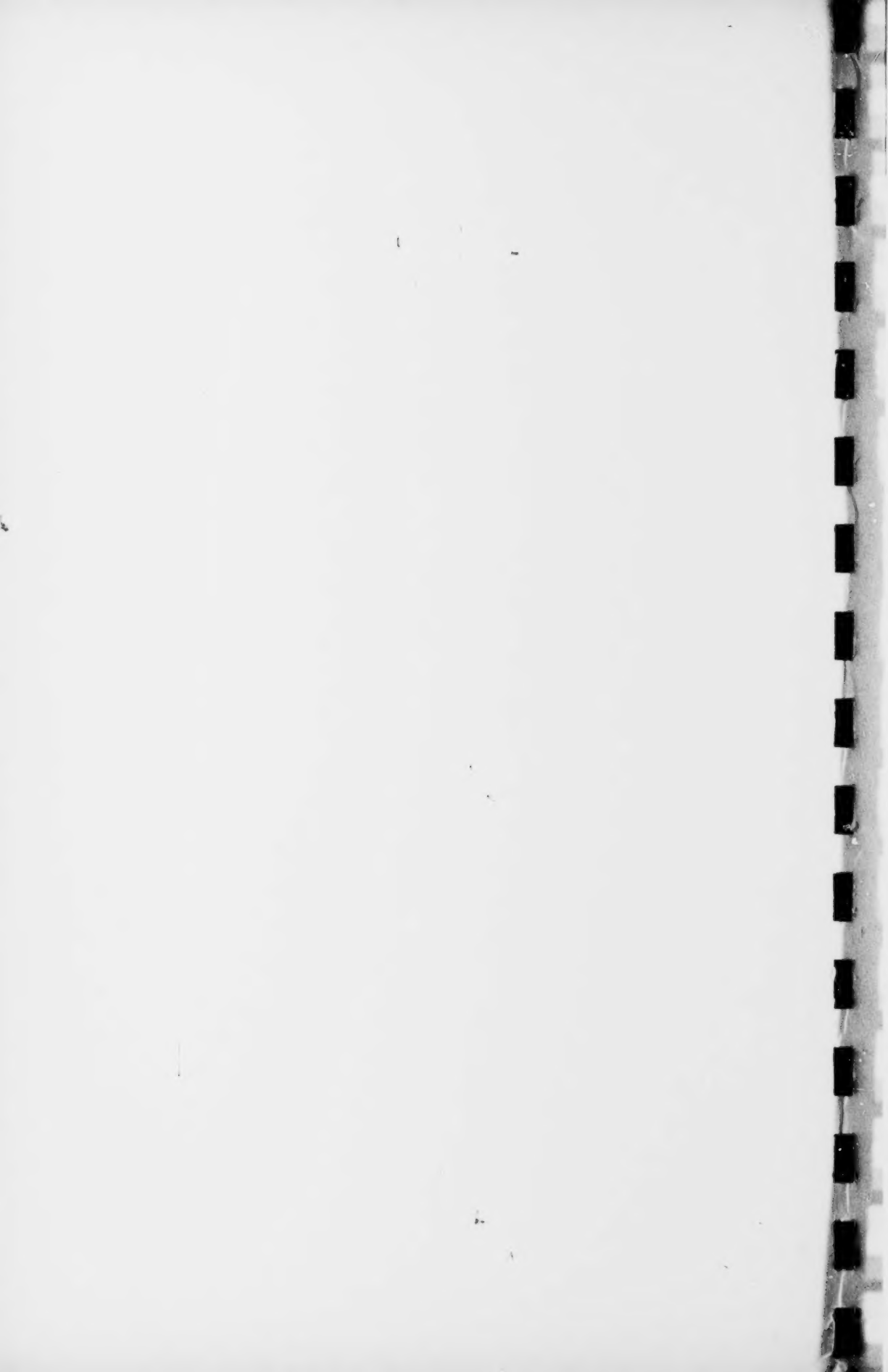
4. Based upon the facts of the present case, the Court should have found on the merits that Plaintiff was without fault in accepting a Social Security overpayment and it would defeat the purposes of the Social Security Act, and be against equity and good



conscience to require Plaintiff to repay the overpayment.

5. That the facts supporting this motion are clearly set forth in the record, and the legal arguments and authorities are more specifically set forth in Plaintiff's Memorandum of Law in Support of Judgment, Plaintiff's Memorandum of Law in Support of Entry of Default and Default Judgment, and Plaintiff's Memorandum of Law in Support of this motion.

WHEREFORE, your Movant prays the Court that an Order issue altering or amending this Court's Order dated September 30, 1987, and the Judgment entered thereon on October 2, 1987, and that this Court, pursuant to Rule 59 of the Federal Rules of Civil Procedure



grant the Plaintiff the following relief:

1. Grant Plaintiff's Motion for Entry of Default and Default Judgment against the Defendant.

2. Set aside this Court's judgment for the Defendant upon the counterclaim.

3. In the alternative, if the Court does not enter default and default judgment against the Defendant, enter a judgment on the merits reversing the decision of the Secretary and finding that Plaintiff was without fault in accepting the overpayment and that it would defeat the purposes of the Social Security Act and be against equity and good conscience to require the Plaintiff to repay the overpayment, or, in the alternative, if the Court declines to

reverse outright, remand this action to the Secretary for further proceedings.

Respectfully submitted, this the 12th day of October, 1987.

LEGAL SERVICES OF THE LOWER
CAPE FEAR

BY: /s/ James J. Wall

JAMES J. WALL

Attorney for Plaintiff

16 South Front Street

Post Office Box 814

Wilmington, North Carolina

28402-0814

(919) 763-6207

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing and annexed MOTION TO ALTER OR AMEND JUDGMENT upon Defendant by mailing a true copy of the same in the United



States Mail, first-class postage
prepaid, addressed to: Mr. Rudolph A.
Renfer, Jr., Assistant United States
Attorney, Civil Section, Post Office Box
26897, Raleigh, North Carolina 27611.

This the 12th day of October, 1987.

/s/ James J. Wall

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
NO. 86-59-CIV-4

STANLEY A. EXNER,)

Plaintiff,)

)

v.)

R E S P O N S E

)

OTIS R. BOWEN,)

Secretary of)

Health and Human)

Services,)

Defendant.)

COMES NOW the defendant in the
above-entitled matter and files this
response to the motion to alter or amend

the judgment and shows until the Court the following:

The motion to alter or amend the judgment, which has been filed by plaintiff pursuant to Rule 59 of the Federal Rules of Civil Procedure, should not be granted for the reason that the Court was correct in its original holding, and the three bases upon which the plaintiff desires the Court to alter or amend the judgment are not well taken.

The first reason given by the plaintiff to amend the judgment is to allow plaintiff's motion for entry of default and default judgment. Pursuant to 55(e) of the Federal Rules of Civil Procedure, no default judgment shall be entered against the United States without establishing a claim or right of



relief by evidence satisfactory to the Court. Very clearly, the evidence before the Court does not, in fact, support any such theory, especially after the entry of the transcript in the case as well as the motion for judgment on the pleadings, which was obviously accepted by the Court.

As to the plaintiff's second contention, there very clearly was a counterclaim filed before this Court on August 15, 1986. The motion to dismiss which was a part of the same pleading was subsequently withdrawn, but the counterclaim was in no manner withdrawn.

This is a case in which all the administrative remedies were pursued by the plaintiff and his application to the Department of Health and Human Services to be relieved from the repayment was

clearly denied. This Court, in its order of October 2, 1987, determined that the Department of Health and Human Services was correct and that the United States of America was entitled to its counterclaim for the recovery of this overpayment.

The third basis for plaintiff's motion to alter or amend the judgment is nothing more than repetition of his contention before this Court when both parties submitted their motions for judgment on the pleadings. There is clearly substantial evidence to support the holding of the Department of Health and Human Services that the repayment of the overpayment to plaintiff should not be waived and that the United States of America is entitled to recover this sum.

WHEREFORE, the United States of America respectfully requests that the motion to alter or amend the judgment filed by plaintiff be denied.

Respectfully submitted, this 4th day of November, 1987.

J. DOUGLAS McCULLOUGH

Acting United States

Attorney

BY: /s/ R. A. Renfer, Jr.

R. A. RENFER, JR.

Assistant United States

Attorney

Chief, Civil Section

P. O. Box 26897

Raleigh, NC 27611

Telephone: (919) 856-4530

CERTIFICATE OF SERVICE

I certify that I have on this 4th day of November, 1987, served the



foregoing Response upon plaintiff's
counsel by mailing same in a postpaid
envelope to:

Mr. James J. Wall

Attorney at Law

P.O. Box 814

Wilmington, NC 28702 (sic)

/s/ R. A. Renfer, Jr.

R. A. RENFER, JR.

Assistant United States

Attorney

Chief, Civil Section

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
No. 86-59-CIV-4

STANLEY A. EXNER,)
 Plaintiff,)
)
 v.) ORDER
)
OTIS R. BOWEN,)
M.D., Secretary)
of Health and)
Human Services,)
 Defendant.)

The court has before it a motion by the plaintiff to vacate the order of judgment in favor of the Secretary filed October 2, 1987, in this case.

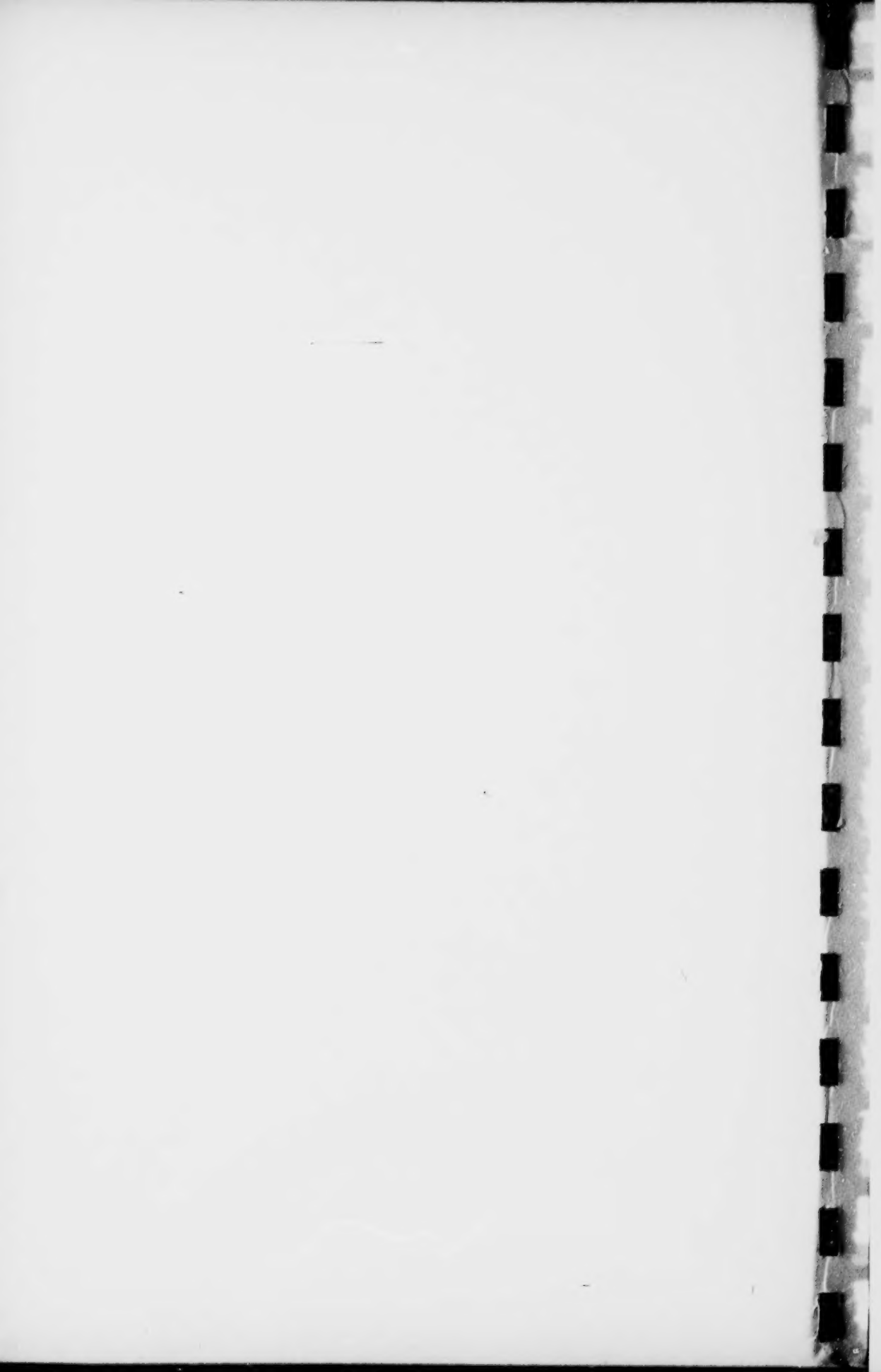
To clarify the procedural setting of this case, it appears that there are two cases now pending in this district involving these parties. One of them is the instant case in which the plaintiff seeks a review of the administrative decision of the Secretary. The other case is the case of United States v. Exner, et al, No. 84-60-CIV-4, in which the government sought recovery of the claimed overpayment arising out of the same facts as are involved in this case. That case has not been consolidated with this case and was not considered by the court in this case. A stay has been entered heretofore in that case, pending the resolution of this case.

Upon an examination of the record, it appears that the plaintiff is correct in his motion in reciting the procedural

defect in the defendant's counterclaim. The defendant filed a motion and counterclaim rather than an answer and counterclaim. Thereafter, the motion was abandoned but the counterclaim apparently remained in existence. This counterclaim was irregular under the rules, and no reply was ever made to it nor was any reply required by the plaintiff.

At a later time the United States filed an answer but did not file a counterclaim nor did it renew the pending counterclaim. No reply was required to the answer since there was no counterclaim included in it.

The government also made an untimely motion for judgment on the pleadings to which the plaintiff objected. The court sustained this



objection and did not consider the government's motion for judgment on the pleadings.

Since the government's counterclaim was irregular and not in conformity with the rules of procedure, and since that counterclaim did not compel a reply from the plaintiff, the issues involving the counterclaim have never been properly pled nor joined by response in a pleading.

The court hereby strikes it (sic) order allowing judgment on the counterclaim for the United States and vacates that order.

At this procedural juncture in the case, the court has now pending before it the plaintiff's motion for judgment on the pleadings. If the government wishes to respond to this, it may

respond within ten days from the date of this order. Thereafter, the court will review the pending motion and make a ruling on it.

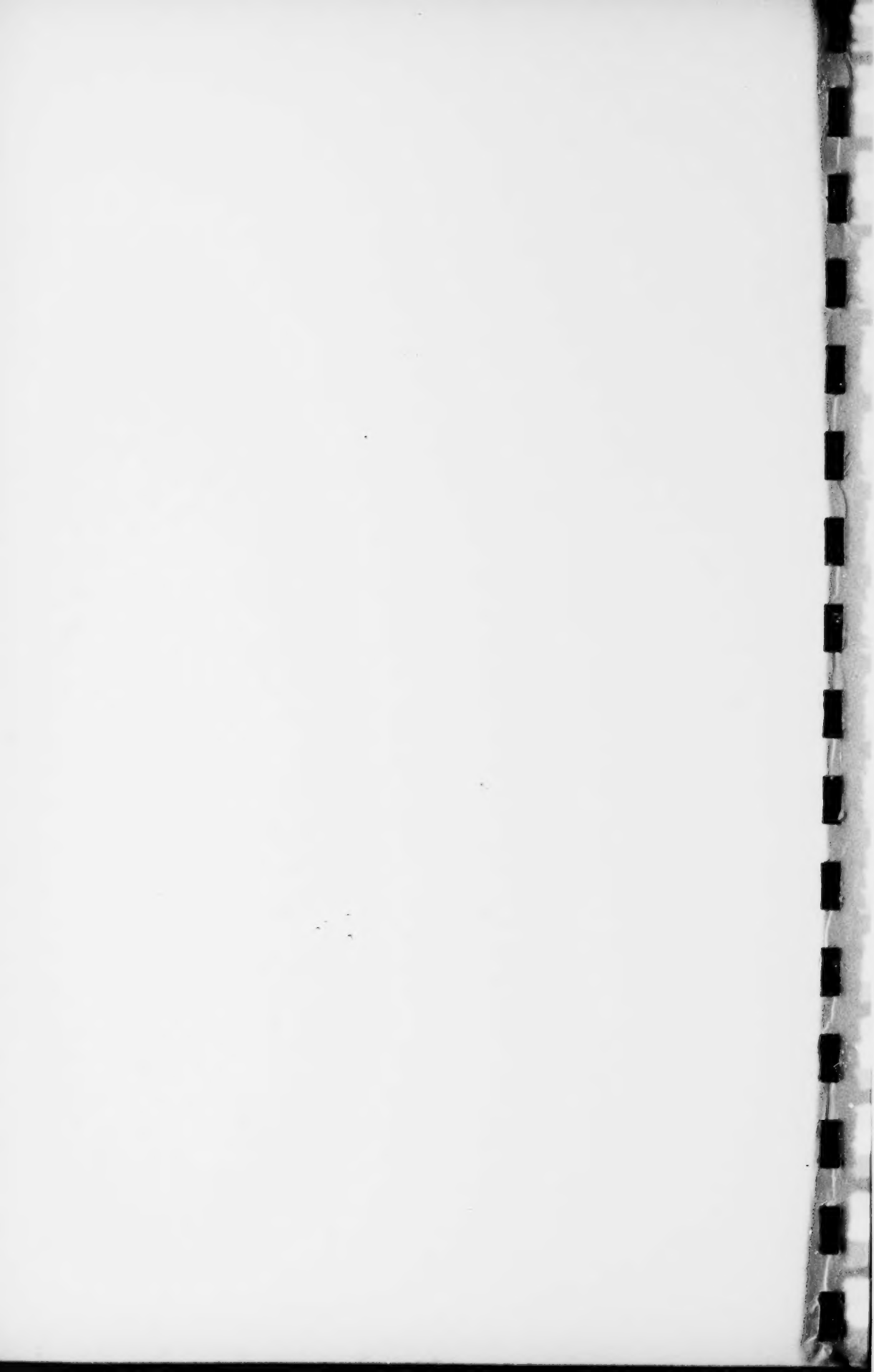
This 3rd day of December, 1987.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE

UNITED STATES DISTRICT

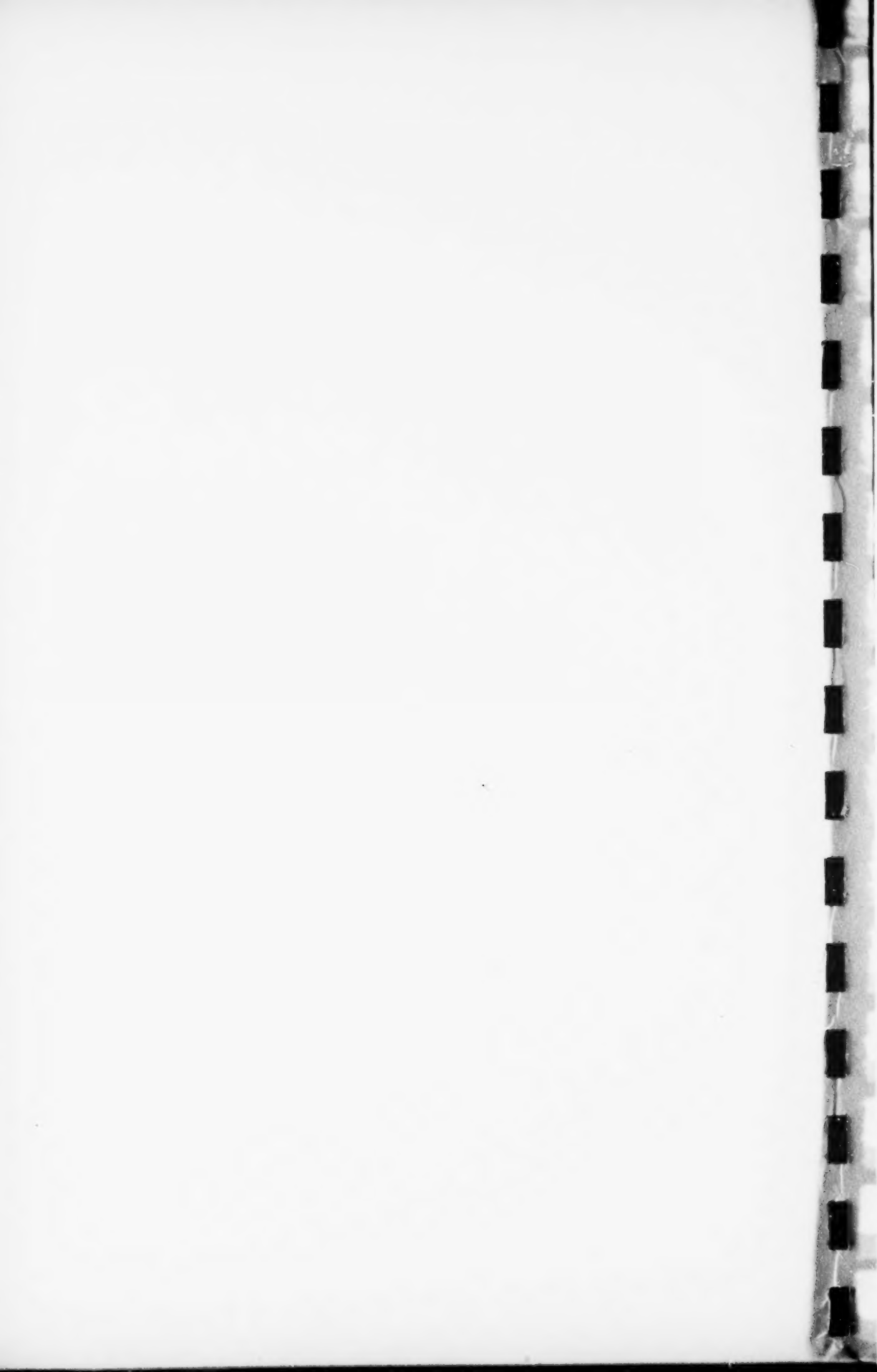
JUDGE



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION
NO. 86-59-CIV-4

STANLEY A. EXNER,)
 Plaintiff,)
)
 v.) RESPONSE TO
) PLAINTIFF'S
OTIS R. BOWEN,) MOTION FOR
Secretary of Health) JUDGMENT
and Human Services,)
 Defendant.)

Now comes the United States of
America, by the undersigned Assistant
United States Attorney and files this
response to plaintiff's motion for
judgment and likewise request that the



United States be granted judgment pursuant to Fed. R. Civ. P. 12(c), because there are no genuine issues of material fact, and the United States is entitled to judgment as a matter of law.

A Memorandum of Law accompanies this motion.

This 11 day of December, 1987.

J. DOUGLAS McCULLOUGH

Acting United States

Attorney

BY: /s/ R. A. Renfer, Jr.

R. A. RENFER, JR.

Assistant United States

Attorney

Chief, Civil Section

P. O. Box 26897

Raleigh, NC 27611

Telephone: (919) 856-4530

CERTIFICATE OF SERVICE

I certify I have this 11 day of
December, 1987, served the foregoing
upon plaintiff's counsel by mailing same
in a postpaid envelope to:

James J. Wall, Esquire

Attorney at Law

P. O. Box 814

Wilmington, NC 28402-0814

/s/ R. A. Renfer, Jr.

R. A. RENFER, JR.

Assistant United States

Attorney

Civil Section

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT COURT
OF NORTH CAROLINA
NEW BERN DIVISION
NO. 86-59-CIV-4

STANLEY A. EXNER,)

Plaintiff,)

)

v.)

)

OTIS R. BOWEN,)

Secretary of Health)

and Human Services,)

Defendant.)

MEMORANDUM IN

SUPPORT OF

MOTION FOR

JUDGMENT

ISSUES

- I. WAS THE PLAINTIFF WITHOUT FAULT IN
RECEIVING AN OVERPAYMENT OF SSI
BENEFITS FOR HIS SON, ANTHONY EXNER?

II. IF PLAINTIFF WAS WITHOUT FAULT,
WOULD RECOVERY OF THE OVERPAYMENT
DEFEAT THE PURPOSES OF THE SOCIAL
SECURITY ACT, OR BE AGAINST EQUITY
AND GOOD CONSCIENCE, OR IMPEDE THE
EFFICIENT AND EFFECTIVE
ADMINISTRATION OF THE SOCIAL
SECURITY ACT?

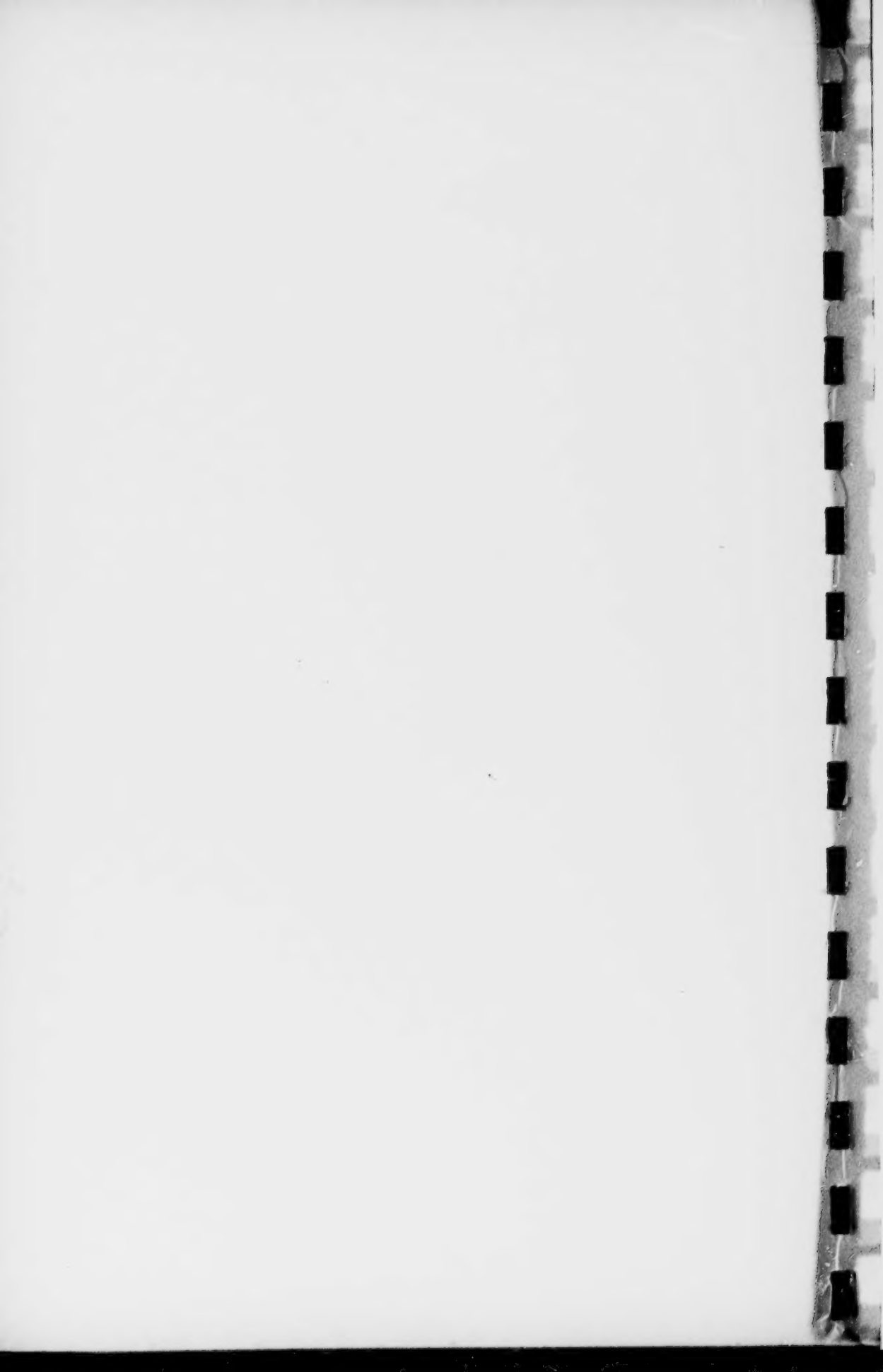
ARGUMENTS

I. THE PLAINTIFF WAS WITHOUT FAULT IN
ACCEPTING SSI OVERPAYMENTS.

20 C.F.R. §416.552 provides that
fault may be found on the part of the
recipient if the recipient:

(1) makes a statement which he
knows or should have known
to be incorrect;

(2) fails to furnish
information which he knows



or should have known to be material; or

- (3) accepts a payment which he knew or could have been expected to know was incorrect.

In the present case, there appears to be no question that Mr. Exner did not make any incorrect statements. The ALJ further did not find that Mr. Exner accepted a payment which he knew or could have been expected to know was incorrect. The ALJ based his decision upon what he considered to be a failure of Mr. Exner to furnish information which he knew or should have known to be material. (R.p. 14). The record in the present case, however, clearly shows that Mr. Exner did furnish information about his employment to SSA and relied

upon the statement of an official of SSA that his employment was okay and that Mr. Exner did not have to do anything until October of the following year. Mr. Exner furnished the official of SSA very detailed information including the amount he would be earning. (R.p. 49). The official's statement that this was okay and the way the official appeared to pass off the information about Mr. Exner's job reasonably led Mr. Exner to believe that his employment did not make any difference in order for his son to receive SSI disability benefits.

A. RELIANCE ON ERRONEOUS
INFORMATION FROM AN OFFICIAL
SOURCE WITHIN SSA.

In the present case, Mr. Exner relied on statements made to him by the Social Security representative that it

was okay for him to work and that he did not have to make any further report to SSA until October of 1980 when the new package would be sent to him. In Valente v. Secretary of Health & H. Services, 733 F.2d 1037 (2nd Cir. 1984), the court noted that Section 204(b) of the Social Security Act, 42 U.S.C. §404(b), is part of a general provision concerning recovery of overpayments under the Act; and that the standard for waiving recovery in that section parallels the standard provided in §1631(b)(1), 42 U.S.C. §1383(b)(1), for waiver of recovery of overpayments in the SSI context. 733 F.2d at 1040 n. 3. The court then proceeded to apply a regulation of the Secretary interpreting §204(b) of the Act, 20 C.F.R. §404.510a, which provides that an individual who

accepts an entitlement overpayment is "without fault" where he "accepts such overpayment because of reliance on erroneous information from an official source within the [SSA]...with respect to the interpretation of a pertinent provision of the...Act or regulations pertaining thereto." 733 F.2d at 1044. In the present case, the statements made to Mr. Exner by the representative of SSA who took his application that his upcoming employment was okay, coupled with the statement that Mr. Exner need only report changes to SSA in October of 1980 when a review would be held, reasonably led Mr. Exner to believe that his son was entitled to disability benefits even though Mr. Exner was working and that Mr. Exner did not need to inform SSA when he actually began

work as he had already just informed the representative of SSA who told him that was okay. Of course, an overpaid SSI recipient is not necessarily relieved of liabilities solely because SSA may have been at fault in making the overpayment, but where the recipient had notified SSA of matters affecting an overpayment and was told not to worry about it, that it would be corrected, but it was not. The court in Meyer v. Secretary of Health, Ed. and Welfare, 513 F.Supp. 41 (W.D.Mich. 1980), held that waiver of recovery of overpayments was appropriate. In Viehman v. Schweiker, 679 F.2d 223 (11th Cir. 1982), the court held that the testimony of a recipient of disability payments on behalf of his retarded daughter that he had telephoned the Social Security office and advised a

person there that his daughter had married another retarded person, if believed, would be sufficient to meet the burden of proof imposed on him in showing that he was "without fault" in subsequently accepting overpayments, for purposes of entitlement of waiver of overpayments. Likewise, in the present case, Mr. Exner's testimony, if believed, that he notified the Social Security representative at the time of his application that he would be commencing a job very shortly and that his salary would be \$13,100 per year is sufficient to show a good faith effort on his part to notify SSA of his employment. In fact, nothing in the Secretary's regulations require notification at or immediately after the time that one commences a job. Rather,

they only require notification of changes in financial circumstances, including household income. Having made such a statement to the Secretary's representative when he applied for benefits for his son, Mr. Exner was reasonable in concluding that he did not have to notify the Secretary again, particularly where he commenced work on the very job he told the Secretary's representative he was getting and had disclosed the full amount of his income. Certainly in light of the representations the Secretary's representative made to Mr. Exner that his employment was okay and that he need only fill out a package which would be sent to Mr. Exner in October of 1980, certainly caused Mr. Exner to believe not only that he had done everything

that he was supposed to do so far as notifying the Secretary about his income and resources, but that he was entitled to receive the payments which in fact he got for his son, Anthony, between June of 1979 and October of 1980. Social Security recipients are not always to be deemed to have knowledge of the law or to be charged with negligence for failure to know it; rather, all the surrounding circumstances must be taken into account before a finding of negligence on a recipient's part in accepting or retaining improperly paid benefits can be made. Cucuzzella v. Weinberger, 395 F.Supp. 1288 (D.Del. 1975); Davidson v. Heckler, 502 F.Supp. 1208 (E.D.Pa. 1980). As the court said in Kendrick v. Califano, 460 F.Supp. 561, 572 (E.D.Va. 1978), "the Social

Security Act is an exceedingly complex and detailed law and the Secretary cannot arbitrarily assume that a plaintiff understood its application to his particular situation."

Even if the Plaintiff's actions constituted a failure to furnish information, that alone is not sufficient to find that the Plaintiff was "not without fault." In Romero v. Harris, 675 F.2d 1100 (10th Cir. 1982), the court held that failure to disclose assets in a savings account which exceeded applicable limits for SSI did not make an individual "at fault" where he was never asked by SSA about the assets in the savings account and would have disclosed them if asked. Likewise, in the present case, Mr. Exner would have notified SSA when he commenced

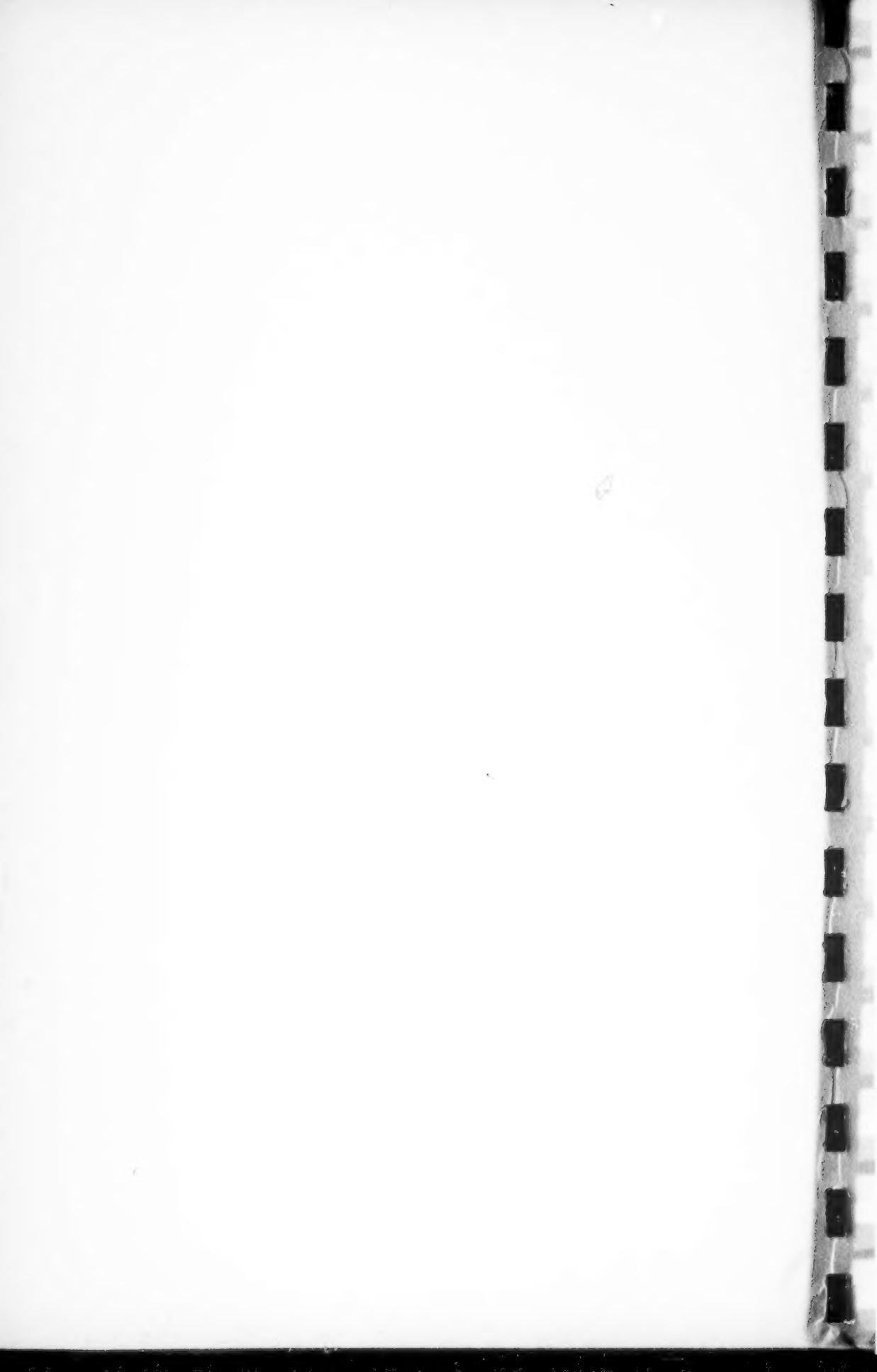
working had it not been for his reasonable reliance upon statements made by the Secretary's representative that his working was okay and he need not report any until he received a package in October of 1980.

In the present case, the ALJ clearly erred by not applying 20 C.F.R. 404.1510a to Mr. Exner's situation in order to determine whether Mr. Exner erroneously relied on information received by the Secretary's representative. Valente v. Schweiker, supra. The ALJ should further have determined whether Mr. Exner's statements to the Secretary's representative about his job and income at the time Mr. Exner's application was made were sufficient notice to the Secretary to render Mr. Exner "without

fault." Cf. Viehman v. Schweiker,
supra. Either of these two errors by
the ALJ requires remand. Although, of
course, if the Secretary's decision
should be affirmed if it is supported by
substantial evidence, there is simply no
substantial evidence to support the
Secretary's decision, and, as pointed
out above, the ALJ appeared to rely on
an erroneous view of the law in arriving
at his decision.

B. CREDIBILITY.

Of course, Mr. Exner has the burden
of proof in showing that he was without
fault and his credibility is certainly
an issue. The ALJ in the present case
made no determination as to Mr. Exner's
credibility. In Califano v. Yamasaki,
442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d
176 (1979), the United States Supreme



Court stated:

The Court previously has noted that a "broad 'fault' standard is inherently subject to factual determination and adversarial input." Mitchell v. W. T. Grant Co., 416 U.S. 600, 617 (1974). As the Secretary's regulations make clear, "fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence...and physical and mental condition" as well as his good faith. 20 C.F.R. §404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. [citations omitted]. 442 U.S. at 696-697, 99 S.Ct. at 2555, 61 L.Ed.2d at 189-190.

In the present case, the ALJ relied on a written notice in the record and did not evaluate Mr. Exner's credibility nor apparently give any weight to his

testimony. This clearly conflicts with the principles set forth in Califano v. Yamasaki. In circumstances such as these, evaluation of credibility is essential. Schwengel v. Harris, 631 F.2d 192 (2nd Cir. 1980). Where a claimant's own testimony was critical in determining whether he was without fault in accepting an overpayment of disability benefits, it was necessary for the finder of facts to articulate any reasons for questioning his credibility. Viehman v. Schweiker, supra; see also Cucuzzella v. Weinberger, supra.

As the court in Cucuzzella v. Weinberger, supra, further pointed out, the testimony of a claimant with regard to fault is admissible without corroboration. As the court stated in

Lewin v. Schweiker, 654 F.2d 631 (9th

Cir. 1981):

The rule has been applied to credibility determinations and the courts have consistently required that there be an explicit finding whether the Secretary believed or disbelieved the claimant whenever the claimant's credibility is a critical factor in the Secretary's decision. 654 F.2d at 635.



IN THE UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 88-3968

STANLEY A. EXNER,

APPELLANT

VS.

OTIS R. BOWEN,

Secretary of Health

and Human Services,

APPELLEE

Appeal from the United States District
Court for the Eastern District of North
Carolina, New Bern Division

BRIEF OF APPELLANT

ISSUES

- I. WAS THE APPELLANT WITHOUT FAULT IN RECEIVING AN OVERPAYMENT OF SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY BENEFITS FOR HIS SON, ANTHONY EXNER?
- II. IF APPELLANT WAS WITHOUT FAULT, — WOULD RECOVERY OF THE OVERPAYMENT DEFEAT THE PURPOSES OF THE SOCIAL SECURITY ACT, OR BE AGAINST EQUITY AND GOOD CONSCIENCE, OR IMPEDE THE EFFICIENT AND EFFECTIVE ADMINISTRATION OF THE SOCIAL SECURITY ACT?
- III. DID THE TRIAL COURT USE AN INCORRECT LEGAL STANDARD TO DETERMINE APPELLANT'S MOTION FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE APPELLEE?

ARGUMENTS

I. THE APPELLANT WAS WITHOUT FAULT IN RECEIVING AN OVERPAYMENT OF SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY BENEFITS FOR HIS SON, ANTHONY EXNER.

Analysis of the issue of whether Mr. Exner was without fault in receiving an SSI overpayment for his son, Anthony Exner, requires examination of four sub-issues:

- A. Whether Mr. Exner properly notified the SSA of his employment;
- B. Mr. Exner's reliance on erroneous information from an official within the SSA;
- C. Mr. Exner's credibility;
- D. Mr. Exner's mental capacity.

Each of these sub-issues will be discussed ad seriatim.

**A. MR. EXNER PROPERLY NOTIFIED THE SSA
OF HIS EMPLOYMENT.**

20 C.F.R. § 416.552 provides that fault may be found on the part of a recipient if the recipient:

- (1) Makes a statement which he knows or should have known to be incorrect;
- (2) Fails to furnish information which he knows or should have known to be material; or
- (3) Accepts a payment which he knew or could have been expected to know was incorrect.

In the present case, the ALJ based his decision solely upon failure of Mr. Exner to furnish information which he knows or should have known to be material, citing 20 C.F.R. § 416.552. App. 29 (A.T. 14). The ALJ did not find that Mr. Exner made any statement which was incorrect, nor that Mr. Exner accepted a

payment which he knew or could have been expected to know was incorrect. App. 26-30 (A.T. 11-15). Thus, the present case is based solely upon the very narrow grounds that Mr. Exner failed to furnish information about his employment to the SSA. While it is true that Mr. Exner was required to furnish the SSA with information about his employment at Camp LeJeune, the record clearly indicates that Mr. Exner furnished that information fully when he applied for SSI for his son, Anthony, on June 7, 1979. Nothing in the above regulation requires that the information be furnished at a particular time, or in a particular manner. Nor does the above regulation require that information be furnished more than once.

The ALJ appears to base his decision upon Mr. Exner's failure to furnish information about his employment after receiving a notice from the SSA of August 8, 1979. Neither the ALJ nor the trial court considered whether Mr. Exner's notice to the Social Security representative, made on June 7, 1979 constituted sufficient notice as required by the regulations about Mr. Exner's employment. Indeed, Mr. Exner had no reason whatsoever to believe that he should provide to Social Security for a second time information which he had already given them and which had not changed materially between June and August. There is absolutely nothing in the record to indicate that Mr. Exner did not notify the SSA on June 7, 1979 about his upcoming job at Camp LeJeune,

and the ALJ did not find that Mr. Exner did not so notify the Social Security representative about his job on that date.

Having previously provided full information about his employment to a representative of the SSA, Mr. Exner could not have been expected to know, from the notice he received two months later, that he should provide the same information to Social Security again. Indeed, nothing in the Secretary's regulations requires him to do so.

Had Mr. Exner been told, when he notified the Social Security representative in June of his upcoming job, that he should again notify Social Security after he actually went to work, Mr. Exner would have done so. Rather, the information he received from the Social

Security representative indicated that he need not concern himself further about this matter, and in fact needed to take no further steps whatsoever until October of the following year. Indeed, Mr. Exner did what a reasonable person would do by bringing the issue of his employment as promptly as possible to the attention of a representative of the SSA and disclosing full information about his upcoming job to that representative at the time he applied. Having received information from that representative, which he had every reason to believe was reliable information, it is not surprising that he did not provide the same job information to Social Security a second time. He had absolutely no reason to believe he should do this, and every reason to believe that he need not.

Furthermore, nothing in the record indicates that there was any change in Mr. Exner's circumstances between June and August other than his employment, the details of which had been fully disclosed on June 7. Thus there can be no doubt, if Mr. Exner's testimony is believed, that he did not fail to furnish any information which he knew or should have known to be material, but rather volunteered such information, fully, as soon as he had the opportunity to do so. Mr. Exner's evidence is completely uncontradicted, and the ALJ never in any way questioned his credibility or discredited any of his testimony. Credibility will be discussed further infra at page 16.

The record in the present case, far from showing that Mr. Exner failed to

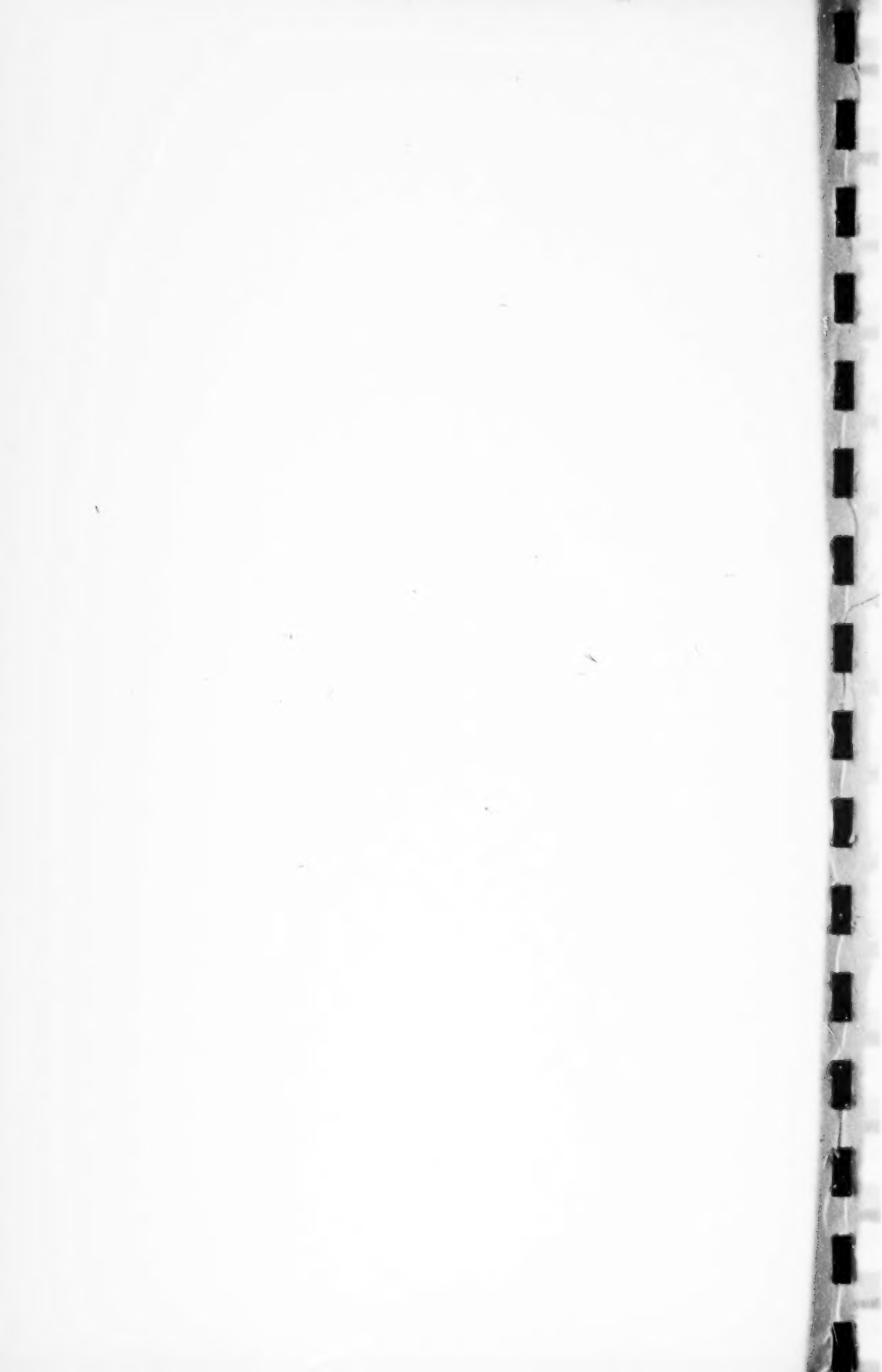
disclose information about his employment at Camp LeJeune to SSA, which is the only basis for finding him "not without fault" given by the ALJ, shows that Mr. Exner fully and completely disclosed such information to an appropriate representative of the SSA and, based upon that representative's statements, had no reason to believe there was any requirement that he disclose it a second time. Thus, Mr. Exner fully complied with the requirement of 20 C.F.R. § 416.552 that he furnish information which he knows or should have known to be material.

**B. RELIANCE ON ERRONEOUS INFORMATION
FROM AN OFFICIAL SOURCE WITHIN SSA.**

In the present case, Mr. Exner relied on statements made to him by the Social Security representative that it



was okay for him to work and receive SSI for his son, and that he did not have to make any further report to SSA until October 1980 when a new package would be sent to him. In Valente v. Secretary of HHS, 733 F.2d 1037 (2d Cir. 1984), the court noted that § 204(b) of the Social Security Act, 42 U.S.C. § 404(b), is part of a general provision concerning recovery of overpayments under the Act; and that the standard for waiving recovery in that section parallels the standard provided in § 1631(b)(1), 42 U.S.C. § 1383(b)(1), for waiver of recovery of overpayments in the SSI context. 733 F.2d at 1040 n. 3. The court in Valente then proceeded to apply a regulation of the Secretary interpreting §204(b) of the Act, 20 C.F.R. §404.510a, which provides that an individual who



accepts an entitlement overpayment is "without fault" where he "accepts such overpayment because of reliance on erroneous information from an official source within the [SSA]...with respect to the interpretation of a pertinent provision of the...Act or regulations pertaining thereto." 733 F.2d at 1044. Certainly the principles of Valente v. Secretary of HHS should apply to the present case. The statements made to Mr. Exner by the representative of SSA who took his application that his upcoming employment was okay, coupled with the statement that Mr. Exner need only report changes to SSA in October of 1980, reasonably led Mr. Exner to believe that his son was entitled to disability benefits even though Mr. Exner would be working. Further, it was

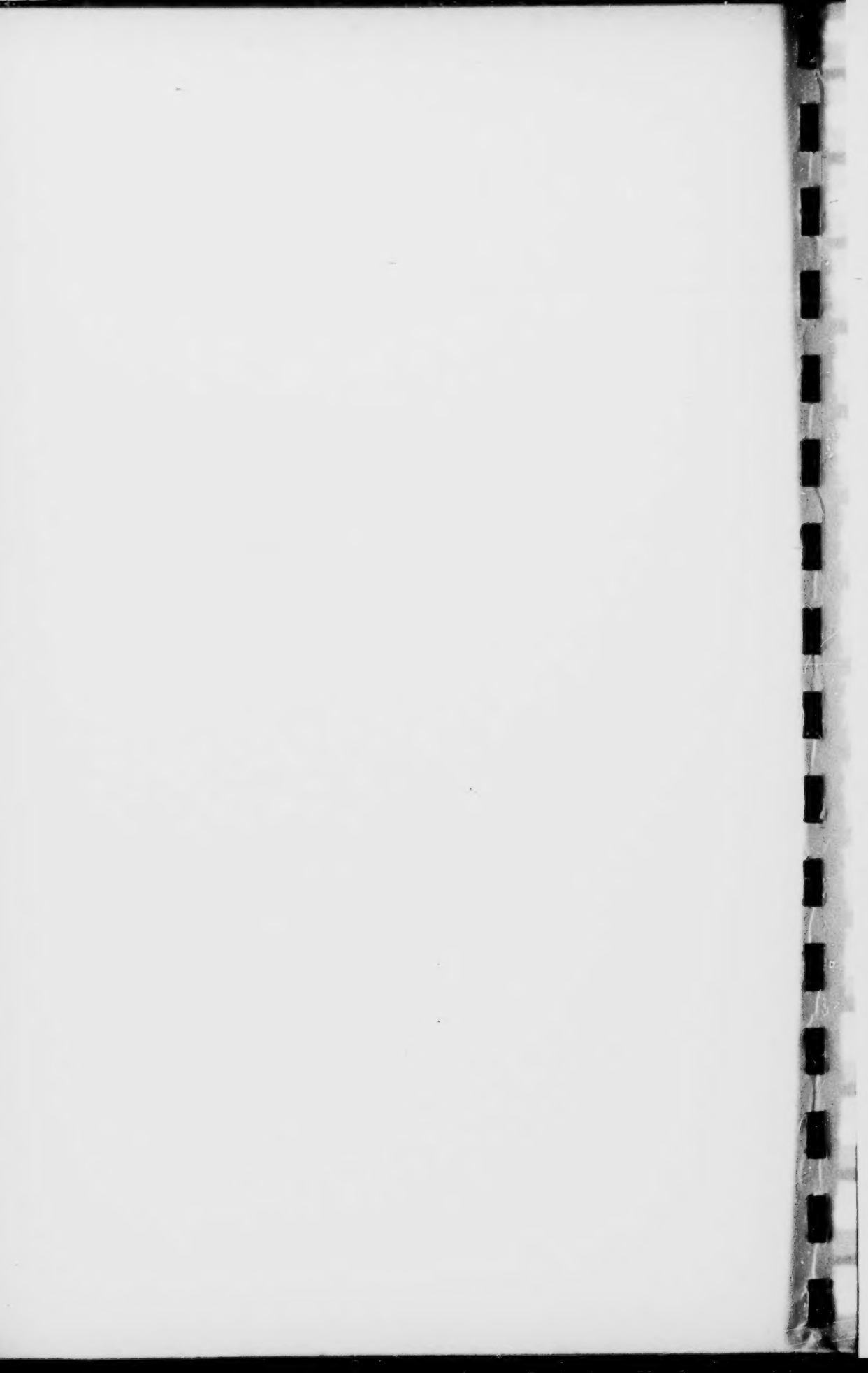
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reasonable for Mr. Exner to believe he did not need to inform SSA when he actually began work.

Of course, an overpaid SSI recipient is not necessarily relieved of liability solely because SSA may have been at fault in making the overpayment; but where the recipient had notified SSA of matters affecting an overpayment and was told not to worry about it, and that it would be corrected, but it was not, the court in Meyer v. Secretary of HEW, 513 F.Supp. 41 (W.D.Mich. 1980), held that waiver of recovery of overpayments was appropriate.

In Viehman v. Schweiker, 679 F.2d 223 (11th Cir. 1982), the court held that information received via telephone from the recipient, if believed, would be sufficient to meet the burden of

proof imposed on him to show that he was "without fault." The facts of Viehman involved the testimony of a recipient of disability payments on behalf of his retarded daughter that he had telephoned the Social Security office and advised a person there that his daughter had married another retarded person. The court examined the circumstances and concluded the information and notice was sufficient to meet the duty imposed on him in showing he was "without fault" for subsequently accepting overpayments. Mr. Exner's case is indeed more cogent. In the present case, Mr. Exner's testimony, if believed, that he notified the Social Security representative at the time of his application that he would be commencing a job within a month and his salary would be \$13,100 per year is



sufficient to show a good faith effort on his part to notify SSA of his employment. Under such circumstances, Viehman v. Schweiker should apply and the ALJ should have found Mr. Exner to be without fault.

Certainly the representations the Secretary's representative made to Mr. Exner that his employment was okay and that he need only fill out a package which would be sent to him in October of 1980 caused Mr. Exner to believe not only that he had done everything he was supposed to do, but that he was entitled to continue to receive the payments which he in fact got for his son, Anthony, between June of 1979 and October of 1980.

Social Security recipients are not always deemed to have knowledge of the



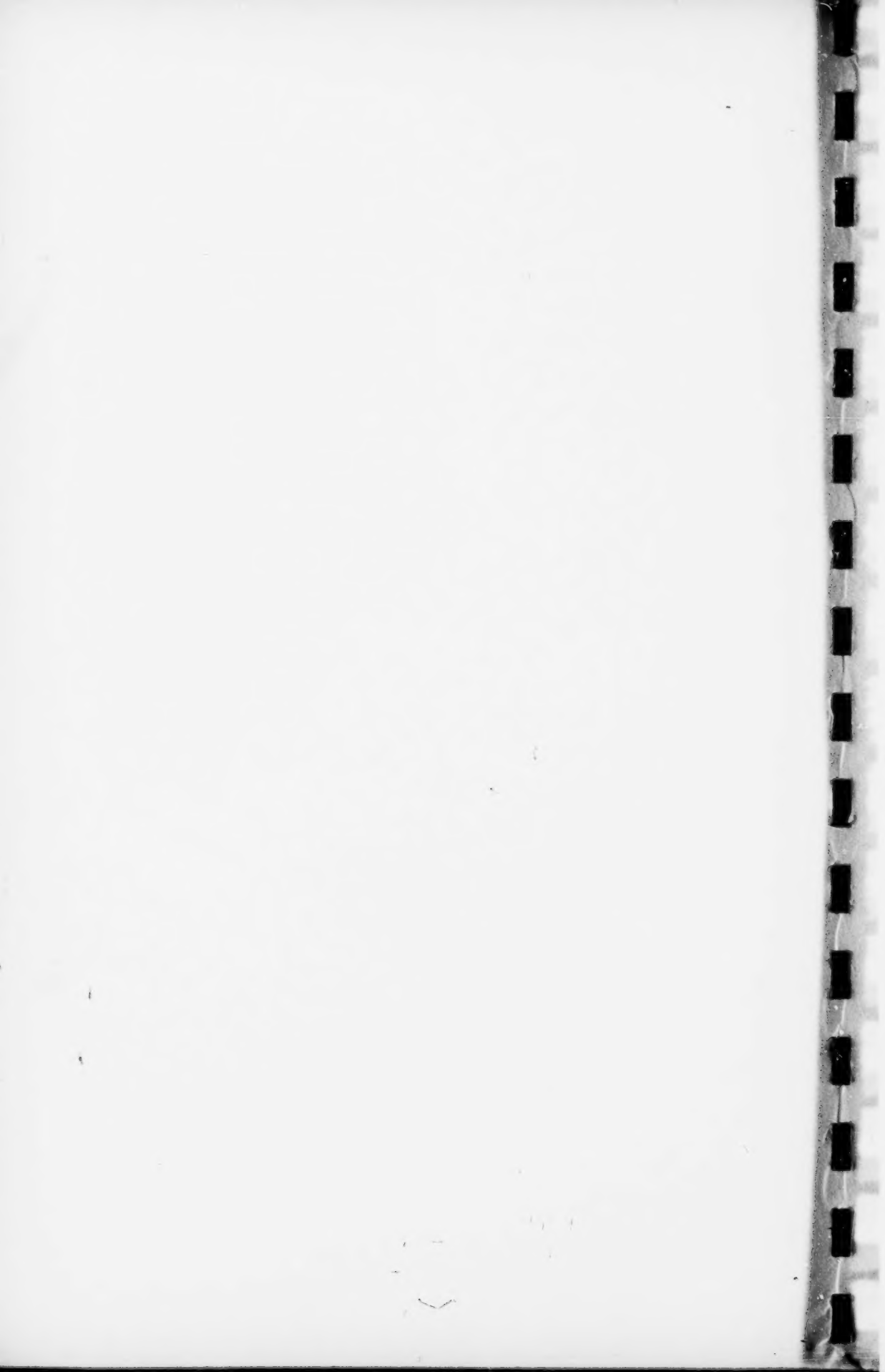
law or to be charged with negligence for failure to know it; rather, all the surrounding circumstances must be taken into account before a finding of negligence on a recipient's part in accepting or retaining improperly paid benefits can be made. Cucuzzella v. Weinberger, 395 F.Supp. 1288 (D.Del. 1975); Cf. Davidson v. Harris, 502 F.Supp. 1208 (E.D.Pa. 1980). As the court said in Kendrick v. Califano, 460 F.Supp. 561, 572 (E.D.Va. 1978), "the Social Security Act is an exceedingly complex and detailed law and the Secretary cannot arbitrarily assume that a plaintiff understood its application to his particular situation."

Even if plaintiff's actions could be construed as a failure to furnish information, that alone is not sufficient



to find that plaintiff was "not without fault." In Romero v. Harris, 675 F.2d 1100 (10th Cir. 1982), the court held that failure to disclose assets in a savings account which exceeded applicable limits for SSI did not make an individual "at fault" where he was never asked by SSA about the assets in the savings account and would have disclosed them if asked. Likewise, in the present case, Mr. Exner would have notified SSA when he commenced working had it not been for his reasonable reliance upon statements by the Secretary's representative that his working was okay and he need not report anything until he received a package in October of 1980.

In the present case, both the ALJ and the trial court clearly erred by not applying 20 C.F.R. § 404.510a to Mr.



Exner's situation in order to determine whether Mr. Exner erroneously relied on information received from the Social Security representative who took his application. Valente v. Secretary. Certainly Mr. Exner's reliance upon the statements made to him by the Social Security representative are part of the surrounding circumstances which should have been taken into account by the ALJ before finding Mr. Exner "not without fault." Cucuzzella v. Weinberger; Davidson v. Harris.

C. CREDIBILITY.

Obviously, Mr. Exner has the burden of proof in showing that he was without fault. There can be no question that his evidence, if believed, clearly meets that burden. The ALJ in the present case made no determination whatsoever as

to Mr. Exner's credibility. In fact, the ALJ never discusses credibility at all, anywhere in his decision. App. 26-30 (A.T. 11-15). The trial court, in its order of January 8, 1988, App. 170-174, indicates that the ALJ determined the issue of credibility against Mr. Exner. In fact, no such determination was ever made anywhere in the administrative record. The trial court is of course correct when it states, App. 173, that credibility decisions are the functions of the Secretary, not the courts.

The problem with the trial court's decision, however, is that in this case the Secretary made no credibility determination at all. In Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979), the United States Supreme Court stated:

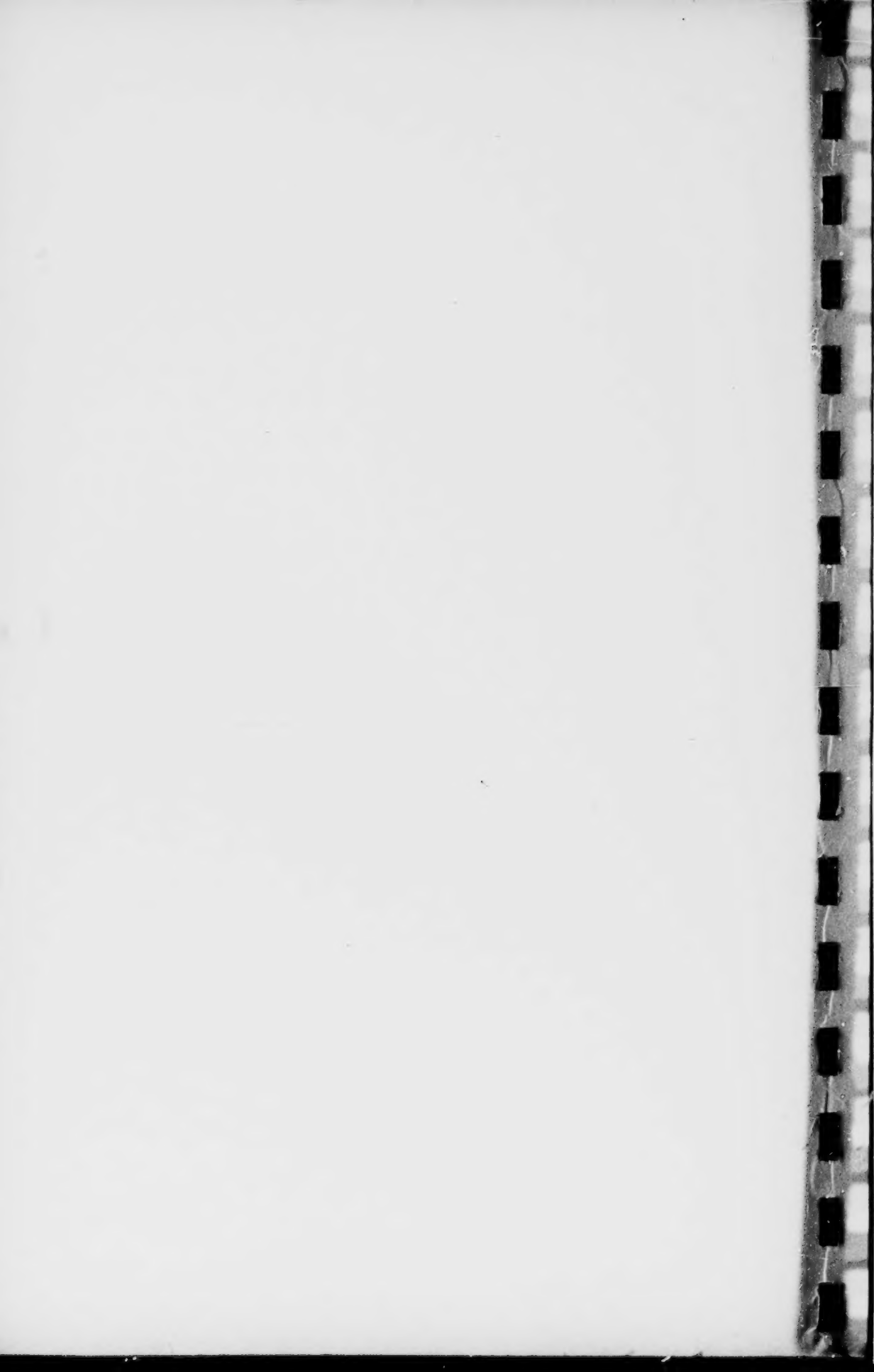
The court has noted that a "broad 'fault' standard is inherently subject to factual determination and adversarial input." Mitchell v. W.T. Grant Co., 416 U.S. 600, 617 (1974). As the Secretary's regulations make clear, "fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence...and physical and mental condition" as well as his good faith. 20 C.F.R. § 404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine, hard-luck story from a fabricated tall tale. [citations omitted]. 442 U.S. at 696-697, 99 S.Ct. at 2555, 61 L.Ed.2d at 189-190.

In the present case, the ALJ relied on a written notice in the record, and did not evaluate Mr. Exner's credibility nor apparently give any weight to his testimony. This clearly conflicts with



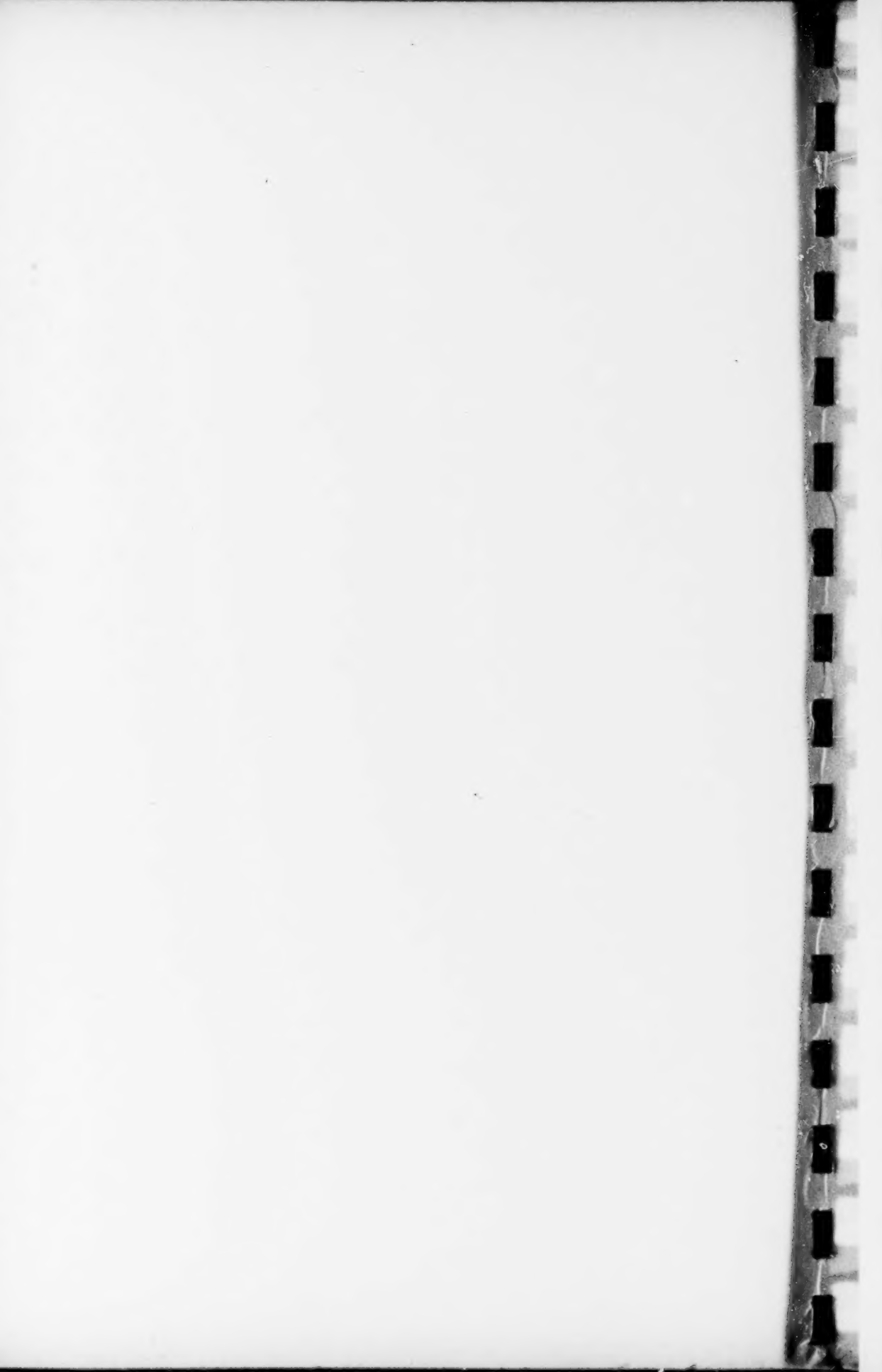
the principles set forth in Califano v. Yamasaki. In circumstances such as these, evaluation of credibility is essential. Schwingel v. Harris, 631 F.2d 192 (2d Cir. 1980). Where a claimant's own testimony was critical in determining whether he was without fault in accepting an overpayment of disability benefits, it was necessary for the finder of fact to articulate any specific or other reasons for questioning his credibility. Viehman v. Schweiker; see also Cucuzzella v. Weinberger. Furthermore, the testimony of a claimant with regard to fault is admissible without corroboration. Cucuzzella v. Weinberger.

Accordingly, the court in Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981):



The rule has been applied to credibility determinations and the courts have consistently required that there be an explicit finding whether the Secretary believed or disbelieved the claimant whenever the claimant's credibility is a critical factor in the Secretary's decision.

The court in Lewin v. Schweiker further held that while it is true an ALJ may choose to disbelieve a claimant's testimony, such testimony cannot be dismissed as inadmissible and must be considered seriously without being entirely discounted because of weak or no objective findings. Rejection of a claimant's testimony must be accompanied by a specific finding to that effect supported by specific, cogent reasons for disbelief. 654 F.2d at 635. This Court has certainly always required an ALJ, in "pain" cases, to



make credibility determinations and to refer specifically to evidence informing the ALJ's conclusion as to credibility. See, e.g., Hammond v. Heckler, 765 F.2d 424, 426, (4th Cir. 1985).

In MacGregor v. Bowen, 786 F.2d 1050 (11th Cir. 1986), the court held that if the Secretary of HHS refuses to credit subjective pain testimony, he must do so explicitly and give reasons for that decision, and where he fails to do so, he has accepted that testimony as true as a matter of law. 786 F.2d at 1054. This Court should apply the same principle to credibility determinations such as those in the present case and hold that where the Secretary has failed to specifically discredit the testimony of a claimant, such as Mr. Exner, the Secretary has accepted his testimony as true as a matter of law.



Over the years, this Court has repeatedly reversed the Secretary for failure to make clear and explicit findings and indicate the reasons for such findings. Compare, Cook v. Heckler, 783 F.2d 1168 (4th Cir. 1986) and Smith v. Heckler, 782 F.2d 1176 (4th Cir. 1986) with Maxey v. Califano, 598 F.2d 874 (4th Cir. 1979) and Thorne v. Weinberger, 530 F.2d 580 (4th Cir. 1976). Certainly the need for clear and explicit reasons and findings is apparent to all, for as this Court said in Gordon v. Schweiker, 735 F.2d 231, 236 (4th Cir. 1984), quoting Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977):

The courts...face a difficult task in applying the substantial evidence test when the Secretary has not considered all relevant evidence. Unless the Secretary has analyzed all



evidence and has sufficiently explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of the court's "duty to scrutinize the record as a whole to determine that the conclusions reached are rational."

The number of cases coming before this Court, where the Secretary has failed to analyze the evidence and make clear the explicit findings, indicates the scope of the problem faced by already overburdened Federal District Courts. Remands for new hearings must come back to the District Courts for review. 42 U.S.C. § 405(g). It is quite appropriate for this Court to follow the path charted by the United States Court of Appeals for the Eleventh Circuit in MacGregor v. Bowen and hold that where the Secretary has failed to analyze or

consider a crucial issue, such as credibility, which established case law requires him to do, that issue should be presumed as a matter of law to be decided against the Secretary. Neither plaintiffs nor the lower courts should have to suffer time-consuming and costly remands and reconsiderations because the Secretary failed to carry out his clearly established legal duty to analyze the evidence and clearly state his findings and reasons.

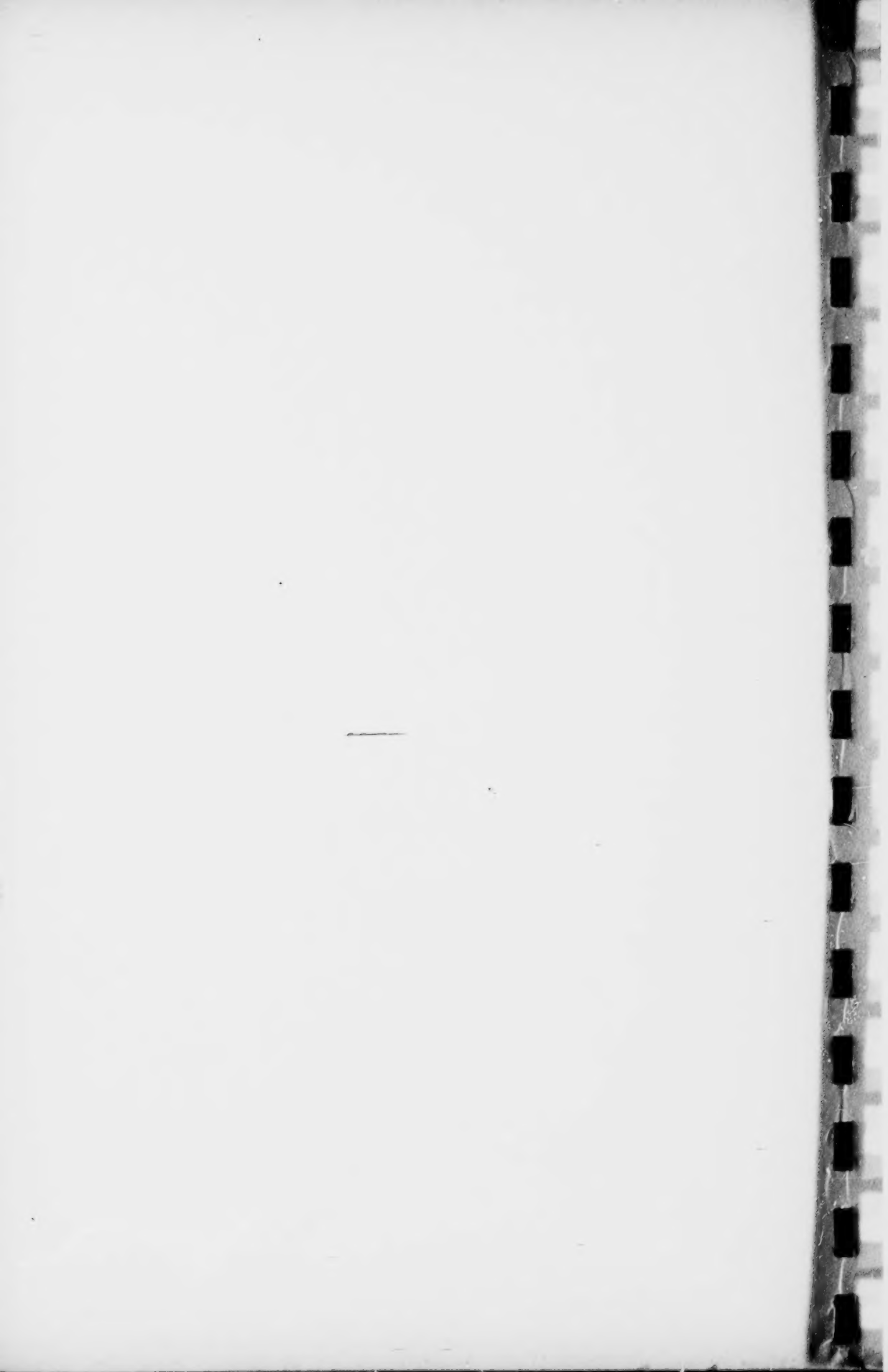
There can be no doubt that the Secretary has had ample opportunity to obtain testimony from the Social Security representative who took Mr. Exner's application, but did not choose to do so. In Dorman v. Harris, 633 F.2d 1035 (2d Cir. 1980), the court noted that the ALJ failed to obtain testimony from a

Social Security employee who spoke to plaintiff. The court further noted such testimony was available and the ALJ should have made an effort to obtain it in order to determine the truth, and failure to do so "weakens the bases for the ALJ's legal and factual conclusions." 633 F.2d at 1040.

At a minimum, the Secretary's failure to make any credibility determinations in the present case requires remand for a new hearing. Plaintiff urges this Court to go farther, however, and adopt the rationale of MacGregor v. Bowen by holding that the Secretary, in the present case, has accepted Mr. Exner's testimony as true. The Court should then reverse the decision of the Secretary and remand for entry of a judgment finding Plaintiff to be without fault under these circumstances.

D. MENTAL CAPACITY.

The ALJ further erred in the present case in failing to determine what effect Mr. Exner's emotional condition, including the breakup of his marriage and the mental and financial difficulties thrust upon him by his son's condition, had upon his ability to understand and comply with the requirements of the regulations. Mr. Exner offered testimony about the breakup of his marriage as well as the difficulties imposed by his son's condition. There is ample evidence in the record of his son's medical condition. App. 141-142 (A.T. 126-127). Yet the ALJ never evaluated, or considered the effect of, these matters upon Mr. Exner at the time he received the August 8, 1979 notice from SSA. A plaintiff's mental and emotional condition is certainly relevant



and should be determined by the ALJ. Harrison v. Heckler, 746 F.2d 480 (9th Cir. 1984); Doherty v. Heckler, 588 F. Supp. 115 (E.D.N.Y. 1984). In the present case, Mr. Exner's mental and emotional condition during the time the overpayments were made is clearly crucial to a proper determination as to whether or not he was without fault in this situation.



42 U.S.C. § 405(b) provides:

(b) Administrative determination of entitlement to benefits statement; findings of facts; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon

request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The

Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

42 U.S.C. § 405(g) provides:

(g) Judicial Review

Any individual, after any final decision of the Secretary made after a hearing to which he is a party, irrespective of the amount in

controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have the power to enter, upon the

pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the



Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was

based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. § 1383(b)(1) provides:

(b) Overpayments and underpayments; adjustment, recovery, or payment of amounts by Secretary

(1) Whenever the Secretary finds that more or less than the correct

amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either). The Secretary (A) shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter, or be

against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration of this subchapter, and (B) shall in any event make the adjustment or recovery (in the case of payment of more than the correct amount of benefits), in the case of an individual or eligible spouse receiving benefit payments under this subchapter (including supplementary payments of the type described in section 1382e(a) of this title and payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66), in amounts which in the aggregate do not exceed (for any month) the lesser of (i) the amount of his or their benefit under this subchapter for that month or (ii) an amount equal to 10 percent of his or their

income for that month (including such benefit but excluding any other income excluded pursuant to section 1382a(b) of this title), unless fraud, willful misrepresentation, or concealment of material information was involved on the part of the individual or spouse in connection with the overpayment, or unless the individual requests that such adjustment or recovery be made at a higher or lower rate and the Secretary determines that adjustment or recovery at such rate is justified and appropriate. The availability (in the case of an individual who has been paid more than the correct amount of benefits) of procedures for adjustment or recovery at a limited rate under clause (B) of the preceding sentence shall not, in and of itself, prevent or restrict the

provision (in such case) of more substantial relief under clause (A) of such sentence.

42 U.S.C. § 404(b) provides:

(b) No recovery from persons without fault

In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

20 C.F.R. § 416.552 provides:

Waiver of adjustment or recovery--without fault.

"Without fault" relates only to the situation of the individual seeking

relief from adjustment or recovery of an overpayment. The overpaid individual (and any other individual from whom the Social Security Administration seeks to recover the overpayment) is not relieved of liability and is not "without fault" solely because the Social Security Administration may have been at fault in making the overpayment. In determining whether an individual is without fault, the "fault" of the overpaid person and the "fault" of the individual seeking relief under the waiver provision are considered. Whether an individual is "without fault" depends on all the pertinent circumstances surrounding the overpayment in the particular case. The Social Security Administration considers the individual's understanding of the reporting requirements, the agreement to

report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition). Although the finding depends on all of the circumstances in the particular case, an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following:

- (a) Failure to furnish information which the individual knew or should have known was material;



(b) An incorrect statement made by the individual which he knew or should have known was incorrect (this includes the individual's furnishing his opinion or conclusion when he was asked for facts), or

(c) The individual did not return a payment which he knew or could have been expected to know was incorrect.

[40 FR 47763, October 10, 1975]

20 C.F.R. § 416.553 provides:

Waiver of adjustment or recovery--defeat the purpose of the supplemental security income program.

We will waive adjustment or recovery of an overpayment when an individual on whose behalf waiver is being considered is without fault (as defined in § 416.552) and adjustment or

recovery of the overpayment would defeat the purpose of the supplemental security income program.

(a) General rule. We consider adjustment or recovery of an overpayment to defeat the purpose of the supplemental security income (SSI) program if the individual's income and resources are needed for ordinary and necessary living expenses under the criteria set out in § 404.508(a) of this chapter

(b) Alternative criteria for individuals currently eligible for SSI benefits. We consider an individual or couple currently eligible for SSI benefits to have met the test in paragraph (a) of this section if the individual's or couple's current monthly income (that is, the income upon which the individual's or couple's eligibility for

the current month is determined) does not exceed--

(1) The applicable Federal monthly benefit rate for the month in which the determination of waiver is made (see Subpart D of this part); plus

(2) The \$20 monthly general income exclusion described in §§ 416.1112(c)(3) and 416.1124(c)(10); plus

(3) The monthly earned income exclusion described in § 416.1112(c)(4); plus

(4) The applicable State supplementary payment, if any (see Subpart T of this part) for the month in which determination of waiver is made.

For those SSI recipients whose income exceeds these criteria, we follow the general rule in paragraph (a) of this section.

[45 FR 72649, Nov. 3, 1980, as amended
at 50 FR 48573, Nov. 26, 1985]

20 C.F.R. § 416.554 provides:

**Waiver of adjustment or recovery--
against equity or good conscience.**

Waiver of adjustment or recovery of an overpayment is proper when the person on whose behalf waiver is being considered is without fault, as defined in § 416.552, and adjustment or recovery would be against equity or good conscience. Adjustment or recovery is considered to be inequitable and contrary to good conscience when such person, in reliance on such payments or on notice that such payment would be made relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's financial circumstances are not considered.

Example 1: Upon being notified that he was eligible for supplemental security income payments, an individual signed a lease on an apartment renting for \$15 a month more than the room he had previously occupied. It was subsequently found that eligibility for the payment should not have been established. In such a case recovery would be considered against equity or good conscience.

Example 2: An individual fails to take advantage of a private or organization charity, relying instead on the award of supplemental security income payments to support himself. It was subsequently found that the money was improperly paid. Recovery would be considered against equity or good conscience.

[40 FR 47764, Oct. 10, 1975]

20 C.F.R. § 404.510a provides:

When an individual is "without fault" in an entitlement overpayment.

A benefit payment under title II or title XVIII of the Act to or on behalf of an individual who fails to meet one or more requirements for entitlement to such payment or a benefit payment exceeding the amount to which he is entitled, constitutes an entitlement overpayment. Where an individual or other person on behalf of an individual accepts such overpayment because of reliance on erroneous information from an official source within the Social Security Administration (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits under title II or title XVIII



of the Act) with respect to the interpretation of a pertinent provision of the Social Security Act or regulations pertaining thereto, or where an individual or other person on behalf of an individual is overpaid as a result of the adjustment upward (under the family maximum provision in section 203 of the Act) of the benefits of such individual at the time of the proper termination of one or more beneficiaries on the same social security record and the subsequent reduction of the benefits of such individual caused by the reentitlement of the terminated beneficiary(ies) pursuant to a change in a provision of the law, such individual, in accepting such overpayment, will be deemed to be "without fault." For purposes of this section "governmental agency" includes intermediaries and carriers under contract

pursuant to sections 1816 and 1842 of the Act.

[39 FR 43716, Dec. 18, 1974]

Rule 55, Federal Rules of Civil Procedure provides:

Rule 55. Default

(a) Entry

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment

Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a

sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court thereof; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has

appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting aside default

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the United States

No judgment by default shall be entered against the United States or an

officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.